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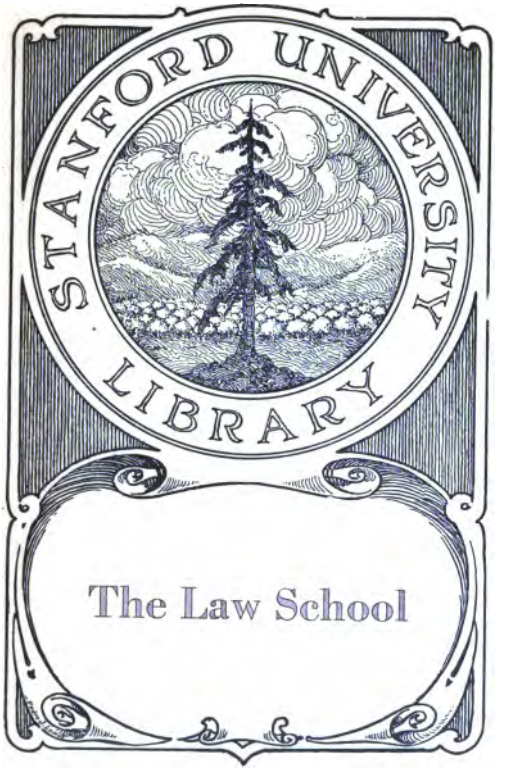
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The Supreme Court and the Constitution

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The Supreme Court and the Constitution

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PREFACE.

This little volume is based upon an article which I published in the *Political Science Quarterly* for March, 1912. The original text has been considerably expanded by the addition of new illustrative materials. It seems hardly necessary to apologize for including such copious quotations from the writings of "the Fathers" on the point at issue. The best paraphrases are never so eloquent or convincing as the documents themselves.

Mr. B. E. Shultz assisted me in collecting the materials for the essay, and I wish to acknowledge my debt to him for this service.

C. A. B.

Columbia University.
April, 1912.

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CHAPTER I.

Attacks upon Judicial Control.

Did the framers of the federal Constitution intend that the Supreme Court should pass upon the constitutionality of acts of Congress? The emphatic negative recently given to this question by legal writers of respectable authority[1] has put the sanction of some guild members on the popular notion that the nullification of statutes by the federal judiciary is warranted neither by the letter nor by the spirit of the supreme law of the land and is, therefore, rank usurpation. Thus the color of legality, so highly prized by revolutionaries as well as by apos-

[1] *Cf.* Chief Justice Walter Clark, of North Carolina, Address before the Law Department of the University of Pennsylvania, April 27, 1906; reprinted in *Congressional Record*, July 31, 1911. Dean William Trickett, of the Dickinson Law School, "Judicial Dispensation from Congressional Statutes," *American Law Review*, vol. xli, pp. 65 *et seq.* L. B. Boudin, of the New York Bar, "Government by Judiciary," *Political Science Quarterly*, vol. xxvi (1911), pp. 238 *et seq.* Gilbert Roe, of the New York Bar, "Our Judicial Oligarchy" (second article), *La Follette's Weekly Magazine*, vol. iii, no. 25, pp. 7–9, June 24, 1911.

tles of law and order, is given to a movement designed to strip the courts of their great political function. While the desirability of judicial control over legislation may be considered by practical men entirely apart from its historical origins, the attitude of those who drafted the Constitution surely cannot be regarded as a matter solely of antiquarian interest. Indeed, the eagerness with which "the views of the Fathers" have been marshalled in support of the attack upon judicial control proves that they continue to exercise some moral weight, even if they are not binding upon the public conscience.

In an address before the Law Department of the University of Pennsylvania on April 27, 1906, the Honorable Walter Clark, Chief Justice of North Carolina, expressly declares that it was not the intention of the framers to confer upon the courts the power of passing upon the constitutionality of statutes. A proposition was made in the convention, he maintains, to confer this high power upon the judiciary and was defeated; the doctrine of judicial control had been enunciated in but a few cases before the meeting of the Convention and had been strongly disapproved by the people; the action of the Supreme Court in assuming the power to declare an act of

Congress void was without a line in the Constitution to authorize it either expressly or by implication; and had the Convention intended to give the courts this power, it would not have left its exercise unreviewable and final.

To state the case in Mr. Justice Clark's own language:

> A proposition was made in the convention—as we now know from Mr. Madison's Journal—that the judges should pass upon the constitutionality of acts of Congress. This was defeated June 5, receiving the vote of only two States. It was renewed no less then three times, i. e., on June 6, July 21, and finally again for the fourth time on August 15; and, though it had the powerful support of Mr. Madison and Mr. James Wilson, at no time did it receive the votes of more than three States. On this last occasion (August 15) Mr. Mercer thus summed up the thought of the convention: He disapproved of the doctrine that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be incontrovertible.
>
> Prior to the convention, the courts of four States—New Jersey, Rhode Island, Virginia, and North Carolina—had expressed an opinion that they could hold acts of the legislature unconstitutional. This was a new doctrine never held before (nor in any other country since) and met with strong disapproval. In Rhode Island the movement to remove the offending judges was stopped only on a suggestion that they could be "dropped" by the legislature

at the annual election, which was done. The decisions of these four State courts were recent and well known to the convention. Mr. Madison and Mr. Wilson favored the new doctrine of the paramount judiciary, doubtless deeming it a safe check upon legislation, since it was to be operated only by lawyers. They attempted to get it into the Federal Constitution in its least objectionable shape—the judicial veto before final passage of an act, which would thus save time and besides would enable the legislature to avoid the objections raised. But even in this diluted form, and though four times presented by these two very able and influential members, this suggestion of a judicial veto at no time received the votes of more than one-fourth of the States.

The subsequent action of the Supreme Court in assuming the power to declare acts of Congress unconstitutional was without a line in the Constitution to authorize it, either expressly or by implication. The Constitution recited carefully and fully the matters over which the courts should have jurisdiction, and there is nothing, and after the above vote four times refusing jurisdiction, there could be nothing, indicating any power to declare an act of Congress unconstitutional and void.

Had the convention given such power to the courts, it certainly would not have left its exercise final and unreviewable. It gave Congress power to override the veto of the President, though that veto was expressly given, thus showing that in the last analysis the will of the people, speaking through the legislative power, should govern. Had the convention supposed the courts would assume such power, it would certainly have given Congress some review over judicial action and certainly would not have placed the judges irretrievably beyond "the con-

sent of the governed" and regardless of the popular will by making them appointive, and further clothing them with the undemocratic prerogative of tenure for life.

Such power does not exist in any other country, and never has. It is therefore not essential to our security. It is not conferred by the Constitution; but, on the contrary, the convention, as we have seen, after the fullest debate, four times, on four several days, refused by a decisive vote to confer such power. The judges not only have never exercised such power in England, where there is no written constitution, but they do not exercise it in France, Germany, Austria, Denmark, or in any other country which, like them, has a written constitution.

A more complete denial of popular control of this Government could not have been conceived than the placing of such unreviewable power in the hands of men not elected by the people and holding office for life. The legal-tender act, the financial policy of the Government, was invalidated by one court and then validated by another, after a change in its personnel. Then the income tax, which had been held constitutional by the court for a hundred years, was again so held, and then by a sudden change of vote by one judge it was held unconstitutional, nullified, and set at naught, though it had passed by a nearly unanimous vote both Houses of Congress, containing many lawyers who were the equals, if not the superiors, of the vacillating judge, and had been approved by the President[1] and voiced the will of the people. This was all negatived (without any warrant in the Constitution for the court to set aside an act of Congress) by vote of one judge; and thus $100,000,000 and more of annual taxation was transferred from those most able to bear it

[1] Cleveland did not, in fact, sign the bill.

and placed upon the backs of those who already carried more than their fair share of the burdens of government. Under an untrue assumption of authority given by 39 dead men one man nullified the action of Congress and the President and the will of 75,000,000 of living people, and in the 13 years since has taxed the property and labor of the country, by his sole vote, $1,300,000,000, which Congress . . . . had decreed should be paid out of the excessive incomes of the rich.

In England one-third of the revenue is derived from the superfluities of the very wealthy by the levy of a graduated income tax and a graduated inheritance tax, increasing the per cent. with the size of the income. The same system is in force in all other civilized countries. In not one of them would the hereditary monarch venture to veto or declare null such a tax. In this country alone the people, speaking through their Congress and with the approval of their Executive, can not put in force a single measure of any nature whatever with assurance that it shall meet with the approval of the courts; and its failure to receive such approval is fatal, for, unlike the veto of the Executive, the unanimous vote of Congress (and the income tax came near receiving such vote) can not prevail against it. Of what avail shall it be if Congress shall conform to the popular demand and enact a "rate-regulation" bill and the President shall approve it if five lawyers, holding office for life and not elected by the people, shall see fit to destroy it, as they did the income-tax law? Is such a government a reasonable one, and can it be longer tolerated after 120 years of experience have demonstrated the capacity of the people for self-government? If five lawyers can negative the will of 100,000,000 of men, then the art of government is reduced to the selection of those five lawyers.

A power without limit, except in the shifting views of the court, lies in the construction placed upon the fourteenth amendment, which, passed, as everyone knows, solely to prevent discrimination against the colored race, has been construed by the court to confer upon it jurisdiction to hold any provision of any statute whatever "not due process of law." This draws the whole body of the reserved rights of the States into the maelstrom of the Federal courts, subject only to such forbearance as the Federal Supreme Court of the day, or in any particular case, may see fit to exercise. The limits between State and Federal jurisdiction depend upon the views of five men at any given time; and we have a government of men, and not a government of laws, prescribed beforehand.

At first the court generously exempted from its veto the police power of the several States. But since then it has proceeded to set aside an act of the Legislature of New York restricting excessive hours of labor, which act had been sustained by the highest court in that great State. Thus labor can obtain no benefit from the growing humanity of the age, expressed by the popular will in any State if such statute does not meet the views of five elderly lawyers, selected by influences naturally antagonistic to the laboring classes and whose training and daily associations certainly can not incline them in favor of restrictions upon the power of the employer.

The preservation of the autonomy of the several States and of local self-government is essential to the maintenance of our liberties, which would expire in the grasp of a consolidated despotism. Nothing can save us from this centripetal force but the speedy repeal of the fourteenth amendment or a recasting of its language in terms that no future court can misinterpret.

The vast political power now asserted and exercised by the court to set aside public policies, after their full determination by Congress, can not safely be left in the hands of any body of men, without supervision or control by any other authority whatever. If the President errs, his mandate expires in four years, and his party as well as himself is accountable to the people at the ballot box for his stewardship. If Members of Congress err, they, too, must account to their constituents. But the Federal judiciary hold for life and, though popular sentiment should change the entire personnel of the other two great departments of government, a whole generation must pass away before the people could get control of the judiciary, which possesses an irresponsible and unrestricted veto upon the action of the other departments—irresponsible because impeachment has become impossible, and if it were possible it could not be invoked as to erroneous decisions unless corruption were shown.

The control of the policy of government is thus not in the hands of the people, but in the power of a small body of men not chosen by the people, and holding for life. In many cases which might be mentioned, had the court been elective, men not biased in favor of colossal wealth would have filled more seats upon the bench, and if there had been such decision as in the income-tax case, long ere this, under the tenure of a term of years, new incumbents would have been chosen, who, returning to the former line of decisions, would have upheld the right of Congress to control the financial policy of the Government in accordance with the will of the people of this day and age, and not according to the shifting views which the court has imputed to language used by the majority of the 55 men who met in Philadelphia in 1787. Such methods of con-

trolling the policy of a government are no whit more tolerable than the conduct of the augurs of old who gave the permission for peace or war, for battle or other public movements, by declaring from the flight of birds, the inspection of the entrails of fowls, or other equally wise devices, that the omens were lucky or unlucky—the rules of such divination being in their own breasts and hence their decisions beyond remedy.

It may be that this power in the courts, however illegally grasped originally, has been too long acquiesced in to be now questioned. If so, the only remedy which can be applied is to make the judges elective, and for a term of years, for no people can permit its will to be denied, and its destinies shaped, by men it did not choose, and over whose conduct it has no control, by reason of its having no power to change them and select other agents at the close of a fixed term.

Dean William Trickett, of the Dickinson Law School, in an eloquent and almost vehement article in the *American Law Review* contends that "if the courts possess the power to declare acts of Congress void, they owe it, not to the intention of the makers of the Constitution, but to what Chief Justice Gibson has termed 'necessity,' which seems to be another name for their own desire." The author uses the term "makers" here to mean the members of the conventions of the states who ratified the instrument framed at Philadelphia; and of course his entire argument rests upon silence, for he does

not contend that the conventions reviewed the proposition and decided against it. Perhaps it never occurred to him to inquire what sort of a federal Constitution we should have if the clearly ascertained intention of the "makers" were necessary to the decision of any single point! On the intention of the framers of the Constitution—which from the legal standpoint is, of course, another matter, Dean Trickett is scarcely less decided. After bringing under review the few cases in which state courts had held invalid state statutes previous to the convention of 1787, he continues:

> The convention was composed of fifty-five members. Of these thirty-nine signed the Constitution. There is nothing better than surmise that ten of these gentlemen knew anything of the decisions. Of those who knew, we have no evidence that more than five or six regarded the annulment of statutes a judicial function. We know that Spaight and three or four others[1] did not regard it as such. Shall we assume that the members of the Convention whose sentiment is unknown were divided in the same ratio? It would be sheer imbecility to infer from the preponderance of the numbers who have spoken for, over those who have spoken against, a measure or view, when four times as many as both of these classes of speakers have remained silent, that a majority of the members shared the view of the major part of the speakers.

[1] He does not name them or cite authorities.

Of course Dean Trickett does not categorically deny that the majority of the Convention regarded the annulment of statutes as a normal judicial function; but he so minimizes the actual evidence in the matter as to prejudice his readers strongly against any such view.

A more recent critic of the judiciary, Mr. L. B. Boudin, speaks with less reserve than Dean Trickett on the point:

> There were undoubtedly some men in the Convention who favored the investing of the federal judiciary with general revisory powers over legislation; but all attempts to make the judiciary part of the legislative power of the federal government failed signally and had to be abandoned by their sponsors. The provisions of the Constitution as they now stand contain no reference whatever to any such powers, either expressly or by obvious implication. And there is ample historical proof that—whatever the hopes of some, from the complete silence of the document, as to possible future development—the great majority of the framers never suspected that a general power of the judiciary to control legislation could be interpreted into the new Constitution. They evidently assumed that such extraordinary power could not be exercised unless expressly granted.

The "ample historical proof" which Mr. Boudin mentions is not cited by him, and if he has made the researches himself, he gives no hint as to his methods, sources, and authorities.

Mr. Gilbert Roe, member of the New York Bar, in an article in *La Follette's Weekly Magazine*, claims that it was not the intention of the framers to vest judicial control over legislation in the Supreme Court. He says:

> It can not well be contended that the framers of the Constitution *assumed* that the courts would exercise such supervisory power over legislation as they now lay claim to. The debates in the Convention negative any such idea, as does the fact that the attempt to exercise such power by the state courts over state statutes had been sharply rebuked by the people.

In support of this contention Mr. Roe cited the efforts made in the convention to associate the judges with the executive in the exercise of the revisionary powers, and quotes the remarks of Mercer and Dickinson presented below. How fragmentary and inconclusive this evidence really is will be shown later.

The arguments advanced by these critics to show that the framers of the Constitution did not intend to grant to the federal judiciary any control over federal legislation may be summarized as follows. Not only is the power in question not expressly granted, but it could not have seemed to the framers to be granted by implication. The power to refuse

application to an unconstitutional law was not generally regarded as proper to the judiciary. In a few cases only had state courts attempted to exercise such a power, and these few attempts had been sharply rebuked by the people. Of the members of the Convention of 1787 not more than five or six are known to have regarded this power as a part of the general judicial power; and Spaight and three or four others are known to have held the contrary opinion. It cannot be assumed that the other forty-odd members of the Convention were divided on the question in the same proportion. If any conclusion is to be drawn from their silence, it is rather that they did not believe that any such unprecedented judicial power could be read into the Constitution. This conclusion is fortified by the fact that a proposition to confer upon the federal judges revisory power over federal legislation was four times made in the Convention and defeated.

A careful examination of the articles cited fails to reveal that the writers have made any detailed analysis of the sources from which we derive our knowledge of the proceedings of the Convention and of the views held by its members. They certainly do not produce sufficient evidence to support their sweeping

generalizations. In the interest of historical accuracy, therefore, it is well to inquire whether the evidence available on the point is sufficient to convict the Supreme Court of usurping an authority which the framers of the Constitution did not conceive to be within the judicial province. If the opinions of the majority of the Convention cannot be definitely ascertained, any categorical answer to the question proposed must rest upon the "argument of silence," which, as Fustel de Coulanges warned the Germans long ago, is a dangerous argument.

CHAPTER II.

The Constitutional Convention of 1787 and Judicial Control.

No proposition to confer directly upon the judiciary the power of passing upon the constitutionality of acts of Congress was submitted to the Convention. On this point a statement made in Chief Justice Clark's address, cited above, is misleading. The proposition to which he refers, and which formed a part of the Randolph plan, was to associate a certain number of the judges with the executive in the exercise of a revisionary power over laws passed by Congress. This is obviously a different proposition. Indeed, some members of the Convention who favored judicial control opposed the creation of such a council of revision. The question of judicial control, accordingly, did not come squarely before the Convention, in such form that a vote could be taken on it.

How are we to know what was the intention of

the framers of the Constitution in this matter? The only method is to make an exhaustive search in the documents of the Convention and in the writings, speeches, papers and recorded activities of its members. It is obviously impossible to assert that any such inquiry is complete, for new material, printed or in manuscript, may be produced at any moment. This essay therefore makes no claim to finality. It is designed to throw light on the subject and to suggest ways in which more light may be obtained.

There were in all fifty-five members of the Convention who were present at some of its meetings. Of these at least one-third took little or no part in the proceedings or were of little weight or were extensively absent. Among these may be included: Blount, Brearley, Broom, Clymer, Fitzsimons, Gilman, W. C. Houston, William Houstoun, Ingersoll, Lansing, Livingston, McClurg, Alexander Martin, Mifflin, Pierce and Yates. It is of course difficult to estimate the influence of the several members of the Convention, and between the extremes there are a few regarding whom there may reasonably be a difference of opinion. The preceding list is doubtless open to criticism, but it may be safely asserted

that a large majority of the men included in it were without any considerable influence in the framing of the Constitution.

Of the remaining members there were (say) twenty-five whose character, ability, diligence and regularity of attendance, separately or in combination, made them the dominant element in the Convention. These men were:

Blair	Franklin	*King*	*Morris, R.*	Rutledge
Butler	*Gerry*	*Madison*	*Paterson*	Sherman
Dayton	Gorham	*Martin, L.*	Pinckney, Charles	*Washington*
Dickinson	*Hamilton*	*Mason*	Pinckney, C. C.	*Williamson*
Ellsworth	*Johnson*	*Morris, G.*	*Randolph*	*Wilson*

This list, like the one given above, is tentative; and it is fair to say that, among those whose judgment is entitled to respect, there is no little difference of opinion about the weight of some of the men here enumerated. It can not be doubted, however, that the list includes the decided majority of the men who were most influential in giving the Constitution its form and its spirit. Among these men were the leaders, of whose words and activities we have the fullest records.

Of these men, the seventeen whose names are italicized declared, directly or indirectly, for judicial

control. Without intending to imply that the less influential members were divided on the question in the same ratio as these twenty-five, or that due respect should not be paid to the principle of simple majority rule, it is illuminating to discover how many of this dominant group are found on record in favor of the proposition that the judiciary would in the natural course of things pass upon the constitutionality of acts of Congress. The evidence of each man's attitude is here submitted, the names being arranged, as above, in their alphabetical order.

John Blair, of Virginia, was a member of the Virginia court of appeals which decided the case of Commonwealth *v.* Caton,[1] in 1782, and he agreed with the rest of the judges "that the court had power to declare any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void."[2] Ten years later he was one of the three judges of the federal circuit court for the district of Pennsylvania who claimed that they could not perform certain duties imposed upon them by a law

[1] Thayer, *Cases in Constitutional Law*, vol. i, p. 55.

[2] That the decision could have been reached without invoking this power, as Mr. Boudin argues, *loc. cit.*, p. 245, note 1, does not affect the value of the decision as evidence of Blair's belief in the existence of the power.

of Congress, because the duties were not judicial in nature and because under the law their acts would be subject to legislative or executive control. These judges—Blair, Wilson[1] and Peters—joined in a respectful letter of protest to President Washington, April 18, 1792, in which they declared that they held it to be their duty to disregard the directions of Congress rather than to act contrary to a constitutional principle.[2] It may also be noted that, as a member of the federal Senate, Blair supported the Judiciary Act of 1789, which accorded to the Supreme Court the power to review and reverse or affirm the decisions of state courts denying the validity of federal statutes.[3]

John Dickinson, of Delaware, is usually placed among the members of the Convention who did not recognize the power of the courts to pass upon the constitutionality of statutes; for in the debate on August 15, just after Mercer[4] declared against judicial control, Dickinson said that "he was strongly impressed with the remark of Mr. Mercer as to the

[1] Wilson, as we shall see later, had taken a strong stand, both in the constituent Convention and in the ratifying Pennsylvania convention, in favor of judicial control of legislation. *Cf. infra*, pp. 14, 26. [2] Hayburn's Case, 2 Dallas, 409. [3] *Cf. infra*, p. 44. [4] *Cf. infra*, p. 52.

power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute."[1] Later, however, he accepted the principle of judicial control, either because he thought it sound or because he could find no satisfactory substitute. In one of his "Fabius" letters, written in advocacy of the Constitution in 1788, he says:

> In the senate the sovereignties of the several states will be equally represented; in the house of representatives the people of the whole union will be equally represented; and in the president and the federal independent judges, so much concerned in the execution of the laws and in the determination of their constitutionality, the sovereignties of the several states and the people of the whole union may be considered as conjointly represented.[2]

Whatever his personal preference may have been, he evidently understood that the new instrument implicitly empowered the federal judiciary to determine the constitutionality of laws; and he presents this implication to the public as a commendable feature of the Constitution.

Oliver Ellsworth, of Connecticut, held that the federal judiciary, in the discharge of its normal func-

[1] Farrand, *Records of the Federal Convention*, vol. ii, p. 299.
[2] Ford, *Pamphlets on the Constitution of the United States*, p. 184

tions, would declare acts of Congress contrary to the federal Constitution null and void. In the Connecticut convention, called to ratify the federal Constitution, he was careful to explain this clearly to the assembled delegates.[1] Later, he was chairman of the Senate committee which prepared the Judiciary Act of 1789 and he took a leading part in the drafting and passage of that measure.[2]

Elbridge Gerry, of Massachusetts. When, on June 4, the proposition relative to a council of revision was taken into consideration by the Convention, Gerry expressed doubts

> whether the Judiciary ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some States the Judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation. It was quite foreign from the nature of the office to make them judges of the policy of public measures.[3]

During the debate in the first Congress on the question whether the President had the constitutional right to remove federal officers without the consent of the Senate, Gerry more than once urged

[1] *Cf. infra*, p. 71. [2] *Cf. infra*, p. 44. [3] Farrand, vol. i, p. 97.

that the judiciary was the proper body to decide the issue finally. On June 16, 1789, he said:

Are we afraid that the President and Senate are not sufficiently informed to know their respective duties?.... If the fact is, as we seem to suspect, that they do not understand the Constitution, let it go before the proper tribunal; the judges are the constitutional umpires on such questions.[1]

Speaking on the same subject again, he said:

If the power of making declaratory acts really vests in Congress and the judges are bound by our decisions, we may alter that part of the Constitution which is secured from being amended by the first article; we may say that the ninth section of the Constitution, respecting the migration or importation of persons, does not extend to negroes; that the word persons means only white men and women. We then proceed to lay a duty of twenty or thirty dollars per head on the importation of negroes. The merchant does not construe the Constitution in the manner that we have done. He therefore institutes a suit and brings it before the supreme judicature of the United States for trial. The judges, who are bound by oath to support the Constitution, declare against this law; they would therefore give judgment in favor of the merchant.[2]

Alexander Hamilton, of New York. In Number 78 of *The Federalist*, written in defence of the Constitution, and designed to make that instrument accept-

[1] *Annals of Congress*, vol. i, p. 491.
[2] Elliot's *Debates*, vol. iv, p. 393.

able to the electorate, Hamilton gave a full exposition of his view of the new system. His statement of the principle of judicial control so thoroughly covers the ground that it deserves quotation at length:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests can not be unacceptable.

There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm

that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this can not be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its

statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case it is the province of the courts to liquidate and fix their meaning and operation: So far as they can by any fair construction be reconciled to each other, reason and law conspire to dictate that this should be done: Where this is impracticable it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable that, between the interfering acts of an equal authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the

subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise Will instead of Judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.

If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government and serious oppressions of the minor party in the

community. Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments can warrant their representatives in a departure from it, prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate

mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments than but a few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it: if to both, there would be an unwillingness to hazard the

displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

Rufus King, of Massachusetts. In the discussion of the proposed council of revision which took place in the Convention on June 4, King took the same position as Gerry, observing "that the judges ought to be able to expound the law as it should come before them free from the bias of having participated in its formation."[1] According to Pierce's notes he said that he

was of opinion that the judicial ought not to join in the negative of a law because the judges will have the expounding of those laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution.[2]

James Madison, of Virginia. That Madison believed in judicial control over legislation is unquestionable, but as to the exact nature and extent of that control he was in no little confusion. His fear of the legislature is expressed repeatedly in his writings, and he was foremost among the men who sought to establish a revisionary council of which the

[1] Farrand, vol. i, p. 98. [2] *Ibid.*, p. 109.

judges should form a part. In the Convention he said

> Experience in all the states has evinced a powerful tendency in the legislature to absorb all power into its vortex. This was the real source of danger to the American constitutions; and suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.[1]

The association of the judges with the executive, he contended, "would be useful to the judiciary department by giving it an additional opportunity of defending itself against legislative encroachments."[2] He was evidently greatly disappointed by the refusal of the Convention to establish a revisionary council; for, in after years, he said that "such a control, restricted to constitutional points, besides giving greater stability and system to the rules of expounding the instrument would have precluded the question of a judiciary annulment of legislative acts."[3]

From the first, however, he accepted judicial control only with limitations; and complete judicial paramountcy over the other branches of the federal government he certainly deprecated. When it was proposed to extend the jurisdiction of the Supreme

[1] Farrand, vol. ii, p. 74. [2] *Ibid.*
[3] *Writings of James Madison*, vol. viii, p. 406.

Court to cases arising under the Constitution as well as under the laws of the United States, he

doubted whether it was not going too far to extend the jurisdiction of the court generally to cases arising under the Constitution and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that department.[1]

The refusal of the Convention to establish a council of revision, in his opinion, left the judiciary paramount, which was in itself undesirable and not intended by the framers of the Constitution. In a comment on the proposed Virginia constitution of 1788 he wrote, in that year:

In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them [the laws], and as the courts are generally the last making the decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.[2]

The right of the courts to pass upon constitutional questions in cases of a judicial nature he fully acknowledged; but this did not, in his mind, preclude the other departments from declaring their senti-

[1] Farrand, vol. ii, p. 430. [2] *Writings*, vol. v, pp. 293, 294.

ments on points of constitutionality and from marking out the limits of their own powers. This view he expressed in the House of Representatives (first Congress) when the question of the President's removing power was under debate:

> The great objection... is that the legislature itself has no right to expound the Constitution; that wherever its meaning is doubtful, you must leave it to take its course, until the judiciary is called upon to declare its meaning. I acknowledge, in the ordinary course of government, that the exposition of the laws and Constitution devolves upon the judicial; but I beg to know upon what principle it can be contended that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments. The Constitution is the charter of the people in the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.
>
> Perhaps this is an admitted case. There is not one government on the face of the earth, so far as I recollect—there is not one in the United States—in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the

will of the community, to be collected in some mode to be provided by the Constitution, or one dictated by the necessity of the case. It is, therefore, a fair question, whether this great point may not as well be decided, at least by the whole legislature, as by part—by us, as well as by the executive or the judicial. As I think it will be equally constitutional, I cannot imagine it will be less safe that the exposition should issue from the legislative authority than any other; and the more so, because it involves in the decision the opinions of both of those departments whose powers are supposed to be affected by it. Besides, I do not see in what way this question could come before the judges to obtain a fair and solemn decision; but even if it were the case that it could, I should suppose, at least while the government is not led by passion, disturbed by faction, or deceived by any discolored medium of sight, but while there is a desire in all to see and be guided by the benignant ray of truth, that the decision may be made with the most advantage by the legislature itself.[1]

Madison's view on the point may be summed up as follows: In cases of a political nature involving controversies between departments, each department enjoys a power of interpretation for itself (a doctrine which Marshall would not have denied); in controversies of a judicial nature arising under the Constitution the Supreme Court is the tribunal of last resort; in cases of federal statutes which are held to be invalid by nullifying states the Supreme

[1] Elliot's *Debates*, vol. iv, pp. 382, 383.

Court possesses the power to pass finally upon constitutionality.[1]

Luther Martin, of Maryland, although he opposed the proposition to form a revisionary council by associating judges with the executive, was nevertheless firmly convinced that unconstitutional laws would be set aside by the judiciary. During the debate on July 21 he said:

A knowledge of mankind and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the legislature. And as to the constitutionality of laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws. Join them with the executive in the revision and they will have a double negative. It is necessary that the supreme judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the legislature.[2]

George Mason, of Virginia, favored associating the judges with the executive in revising laws. He recognized that the judges would have the power to declare unconstitutional statutes void, but he regarded this control as insufficient. He said:

[1] *Cf.* Madison's letter of August, 1830, to Everett; *Writings*, vol. ix, p. 383.

[2] Farrand, vol. ii, p. 76. For further evidence of Martin's attitude, *cf. infra*, p. 70.

Notwithstanding the precautions taken in the constitution of the legislature, it would so much resemble that of the individual states, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It would have the effect not only of hindering the final passage of such laws, but would discourage demagogues from attempting to get them passed. It had been said (by Mr. L. Martin) that if the judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of judges they would have one negative. He would reply that in this capacity they could impede in one case only the operation of laws. They could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as judges to give it a free course. He wished the further use to be made of the judges of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences.[1]

Gouverneur Morris, of Pennsylvania, declared, in the debate on July 21, that some check on the legislature was necessary; and he "concurred in thinking the public liberty in greater danger from legislative usurpations than from any other source."[2] He was apprehensive lest the addition of the judiciary to the executive in the council of revision would not be

[1] Farrand, vol. ii, p. 78.

[2] *Ibid.* pp. 75 *et seq.*

enough to hold the legislature in check. Later, when Dickinson questioned the right of the judiciary to set aside laws, Morris said:

He could not agree that the judiciary, which was a part of the executive, should be bound to say that a direct violation of the Constitution was law. A control over the legislature might have its inconveniences. But view the danger on the other side.... Encroachments of the popular branch of the government ought to be guarded against.[1]

This view he later confirmed in the debate on the repeal of the Judiciary Act of 1801, when he said:

It has been said, and truly too, that governments are made to provide against the follies and vices of men.... Hence checks are required in the distribution of the power among those who are to exercise it for the benefit of the people. Did the people of America vest all power in the Legislature? No; they had vested in the judges a check intended to be efficient—a check of the first necessity, to prevent an invasion of the Constitution by unconstitutional laws—a check which might prevent any faction from intimidating or annihilating the tribunals themselves.[2]

William Paterson, of New Jersey. There is perhaps no finer statement of the doctrine of judicial control than that made by Paterson as Associate Justice of the Supreme Court in the case of Van Horne's Lessee *v.* Dorrance (2 Dallas 304) decided

[1] Farrand, p. 299.

[2] Benton, *Abridgment of Debates in Congress*, vol. ii, p. 550.

in 1795. In this case the litigant's title to property depended upon the validity of an act of the State of Pennsylvania and in rendering the opinion Justice Paterson inquired whether the legislature had the power to enact the law in question under the constitution of the commonwealth. He cited the famous passage from Blackstone on the sovereign power and jurisdiction of Parliament and compared that body with our limited legislatures. He said, in the course of his long opinion:

It is evident that in England the authority of the Parliament runs without limits and rises above control. It is difficult to say what the constitution of England is, because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament: It bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice. Some of the judges in England have had the boldness to assert that an act of Parliament, made against natural equity, is void; but this opinion contravenes the general position, that the validity of an act of Parliament cannot be drawn into question by the judicial department: It cannot be disputed, and must be obeyed. The power of Parliament is absolute and transcendent; it is omnipotent in the scale of political existence. Besides, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: Every State in the Union has

its Constitution reduced to written exactitude and precision.

What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution. It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the creature. The Constitution fixes limits to the exercise of legislative authority and prescribes the orbit within which it must move. In short, the Constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the legislature repugnant to the Constitution is absolutely void.

In the second article of the Declaration of Rights, which was made part of the late Constitution of Pennsylvania, it is declared, "That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that

no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent; nor can any man who acknowledges the being of a God be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be, vested in, or assumed by, any power whatever, that shall, in any case, interfere with, or in any manner control, the right of conscience in the free exercise of religious worship." (Dec. of Rights, Art. 2.)

In the thirty-second section of the same Constitution it is ordained: "that all elections, whether by the people or in general assembly, shall be by ballot, free and voluntary." (Const. Penn., Sect. 32.)

Could the legislature have annulled these articles, respecting religion, the rights of conscience, and elections by ballot? Surely no. As to these points there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. If the legislature had passed an act declaring that, in future, there should be no trial by jury, would it have been obligatory? No: It would have been void for want of jurisdiction, or constitutional extent of power. The right of trial by jury is a fundamental law, made sacred by the Constitution, and cannot be legislated away. The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst

the raging of the waves. I take it to be a clear position that if a legislative act oppugns a constitutional principle the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound that, in such case, it will be the duty of the court to adhere to the Constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not a subordinate, but co-ordinate branch of the government.....

Edmund Randolph, of Virginia, does not seem to have expressed himself in the Convention on the subject of judicial control over congressional legislation. In the plan which he presented, however, provision was made for establishing a council of revision, composed of the executive and a convenient number of the judiciary, "with authority to examine every act of the National Legislature before it shall operate." He must, therefore, have been convinced of the desirability of some efficient control over the legislative department. Subsequently, as attorney-general, when it became his duty to represent the government in Hayburn's case[1] and he was

[1] 2 Dallas, 409.

moving for a *mandamus* to compel the circuit court for the district of Pennsylvania to execute a law under which the judges had declined to act on the ground of its unconstitutionality, Randolph accepted the view of the judges that they were not constitutionally bound to enforce a law which they deemed beyond the powers of Congress. The meager abstract of his argument before the Supreme Court in Dallas's *Reports* gives no hint of its precise character; but in a letter to Madison, dated August 12, 1792, Randolph said: "The sum of my argument was an admission of the power to refuse to execute, but the unfitness of the occasion."[1] That he approved the provision of the Judiciary Act of 1789, giving the Supreme Court appellate jurisdiction to review and reverse or affirm a decision of a state court denying the constitutionality of a federal statute, is apparent from his report to Congress on the judicial system in 1790. After enumerating the instances in which cases might be carried up to the Supreme Court from the state courts, he says: "That the avenue to the federal courts ought, in these instances, to be unobstructed is manifest." The only question with which he was concerned was: "In what stage

[1] Moncure Conway, *Edmund Randolph*, p. 145.

and by what form shall their interposition be prayed?"[1]

Hugh Williamson, of North Carolina, certainly believed in judicial control over federal legislation; for, in the debate on the proposition to insert a clause forbidding Congress to pass *ex post facto* laws, he said: "Such a prohibitory clause is in the constitution of North Carolina, and, though it has been violated, it has done good there and may do good here, because the judges can take hold of it."[2] It is obvious that the only way in which the judges can "take hold of" *ex post facto* laws is by declaring them void.

James Wilson, of Pennsylvania, expressed himself in favor of judicial control in the course of the debate on July 21, when the proposition to associate the national judiciary with the executive in the revisionary power was again being considered. He declared:

> The Judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It had been said that the Judges as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight

[1] *American State Papers*, Class X, Miscellaneous, vol. i, p. 23.
[2] Farrand, vol. ii, p. 376.

in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions, the improper views of the Legislature.[1]

Speaking again, on August 23, in favor of giving the national legislature a negative over state legislation, he said that he

considered this as the keystone wanted to complete the wide arch of Government we are raising. The power of self-defence had been urged as necessary for the State Governments. It was equally necessary for the General Government. The firmness of Judges is not of itself sufficient. Something further is requisite. It will be better to prevent the passage of an improper law than to declare it void when passed.[2]

The rejection of the plan to establish a revisionary council did not lead Wilson to infer that thereby the right of the court to pass upon the constitutionality of statutes was denied. On the contrary, in the debates in the Pennsylvania ratifying convention he declared that the proposed Constitution

[1] Farrand, vol. ii, p. 73. [2] *Ibid*, p. 391.

empowered the judges to declare unconstitutional enactments of Congress null and void.[1]

Examination of the speeches, papers and documents of the influential members of the Convention enumerated above fails to disclose any further direct declarations in favor of the principle of judicial review of legislation. However, there is reasonably satisfactory evidence that three other members of this group understood and indorsed the doctrine.

William Johnson, of Connecticut, *Robert Morris*, of Pennsylvania, and *George Washington*. The evidence of their opinions is their approval of the Judiciary Act of 1789. Section 25 of that act provided:

> A final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; ...or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission,— may be reëxamined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

[1] *Cf. infra*, p. 71.

In other words: the Supreme Court may review and affirm a decision of a state court holding unconstitutional a statute of the United States. It surely is not unreasonable to assume that the men who established this rule believed that the Supreme Court could declare acts of Congress unconstitutional independently of decisions in lower state courts. Indeed, it would seem absurd to assume that an act of Congress might be annulled by a state court with the approval of the Supreme Court, but not by the Supreme Court directly.

William Johnson and Robert Morris were members of the first Senate and voted in favor of the Judiciary Act;[1] and Washington, as president, approved the measure.

In addition to these eminent members of the Convention who directly or indirectly supported the doctrine of judicial control over legislation there were several members of minor influence who seem to have understood and approved it. There is direct or indirect evidence in the following cases.

Abraham Baldwin, of Georgia, had no generous faith in the probity of a legislature based on a widely extended suffrage. In speaking on the composition

[1] *Annals of Congress*, vol. i, p. 51.

of the Senate, on June 29, he said: "He thought the second branch ought to be the representation of property, and that in forming it, therefore, some reference ought to be had to the relative wealth of their constituents and to the principles on which the Senate of Massachusetts was constituted."[1] Baldwin does not seem to have spoken on the subject of the judicial control in the Convention; but two years later, on June 19, 1789, he participated in the discussion of the bill constituting the Department of Foreign Affairs. The point at issue was whether the President could remove alone or only with the consent of the Senate; and some members of the House of Representatives held that this was a judicial question. To this Baldwin replied:

Gentlemen say it properly belongs to the Judiciary to decide this question. Be it so. It is their province to decide upon our laws and if they find this clause to be unconstitutional, they will not hesitate to declare it so; and it seems to be a very difficult point to bring before them in any other way. Let gentlemen consider themselves in the tribunal of justice called upon to decide this question on a *mandamus*. What a situation! almost too great for human nature to bear, they would feel great relief in having had the question decided by the repre-

[1] Farrand, vol. i, p. 469.

sentatives of the people. Hence, I conclude, they also will receive our opinion kindly.[1]

Here is a direct statement that it is the duty of the judges to pass upon the constitutionality of statutes; and the statute in question was not one involving an encroachment upon the sphere of the judiciary but one touching the respective powers of the President and Senate. Baldwin here seems to think, however, that the Court would, and ought to, receive with gratitude the expressed opinion of the House of Representatives. Such an opinion, he evidently thought, would aid the judges in reaching a decision but would not be binding upon them. In his later years, however, after the struggle between the Federalists and the Jeffersonians for the control of the national government had begun, Baldwin appears to have retracted his earlier view; for in a debate in the Senate concerning the powers of the presidential electors, in January, 1800, he said:

Suppose either of the other branches of the government, the Executive or the Judiciary or even Congress, should be guilty of taking steps which are unconstitutional, to whom is it submitted or who has control over it except by impeachment? The Constitution seems to have equal confidence in all the branches on their own proper ground,

[1] *Annals of Congress*, vol. i, p. 582.

and for either to arrogate superiority, or a claim to greater confidence, shows them in particular to be unworthy of it, as it is in itself directly unconstitutional.[1]

It is small wonder that Baldwin thought the powers of the judiciary one of the questions that the Convention had left unsettled;[2] but his clear statement on June 19, 1789, may reasonably be taken to represent his understanding of the power conferred on the judiciary by the Constitution. At that time, at least, he believed it a function of the judiciary to pass upon the constitutionality of statutes.

Richard Bassett, of Delaware, was a member of the Senate committee which introduced the Judiciary Act of 1789, and he voted for the measure.[3] Bassett was also one of Adams's Federalist judges, appointed under the act of February 13, 1801; and when the Jeffersonians repealed the law he joined several of his colleagues in a protest against the repeal, on the ground that it was an impairment of the rights secured to them as judicial officers under the Constitution. In a memorial to Congress the deposed judges declared that they were

compelled to represent it as their opinion that the rights secured to them by the Constitution, as members of the

[1] Farrand, vol. iii, p. 383. [2] *Ibid*, p. 370. *Cf. infra*, p. 66.
[3] *Annals of Congress*, vol. i, pp. 18, 51.

judicial department, have been impaired.... The right of the undersigned to their compensation... involving a personal interest, will cheerfully be submitted to judicial examination and decision, in such manner as the wisdom and impartiality of Congress may prescribe.[1]

The memorialists proposed that their rights should be decided by the judicial department; and such a decision would have involved an inquiry regarding the constitutionality of the repeal of the Judiciary Act of 1801.[2] That Bassett believed the repeal unconstitutional, as to the abolition of his judicial functions and salary, and held the judiciary to be the proper authority for deciding the point, is quite evident.

George Wythe, of Virginia, was a member of the Virginia court of appeals which decided the case of Commonwealth *v.* Caton[3] in 1782. Justice Wythe, in his opinion, referred to the practice of certain English chancellors, who had defended the rights of subjects against the rapacity of the crown, and exclaimed:

If the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal;

[1] *American State Papers*, Class X, Miscellaneous, vol. i, p. 340.

[2] A proposition to make provision for submitting the case to judicial determination was defeated in the House on January 27, 1803. *Annals of Congress*, Second Session, 7th Congress, p. 439.

[3] Thayer's *Cases*, vol. i, p. 55. *Cf. supra*, p. 18.

and, pointing to the Constitution, will say to them, here is the limit of your authority and hither shall you go but no further.

The duty of a court to declare unconstitutional laws void could hardly be more energetically asserted. Of course this is not direct evidence that Wythe held that the federal Constitution embodied the principle, but it is clear that he favored the doctrine.

William Few, of Georgia, *George Read*, of Delaware, and *Caleb Strong*, of Massachusetts, who were members of the first Senate under the new government, voted for the Judiciary Act[1] and may therefore, for the reasons indicated above, be regarded as having accepted the principle of the judicial review of federal statutes.

Summing up the evidence: we may say that of the leading members of the Convention no less than fourteen believed that the judicial power included the right and duty of passing upon the constitutionality of acts of Congress. Satisfactory evidence is afforded by the vote on the Judiciary Act that three other leading members held to the same belief. Of the less prominent members, we find that three

[1] *Annals of Congress*, vol. i, p. 51. *Cf. supra*, p. 44.

expressed themselves in favor of judicial control and three others approved it by their vote on the Judiciary Act. We are justified in asserting that twenty-five[1] members of the Convention favored or at least accepted some form of judicial control. This number understood that federal judges could refuse to enforce unconstitutional legislation.

We may now turn to the evidence that judicial control was not regarded by the framers of the Constitution as a normal judicial function under the new system. The researches of those who contend that the doctrine propounded in Marbury *v.* Madison is sheer usurpation have placed only four members of the Convention on record against judicial control; and one of these, John Dickinson, of Delaware, must be stricken from the list.[2] The evidence in the case of the remaining three members is as follows:

[1] To the twenty-three members here enumerated must be added Brearley and Livingston, of New Jersey, who, through their connection with the early case of Holmes *v.* Walton, went on record as understanding and approving the doctrine of judicial review. See *The American Historical Review*, vol. iv, pp. 460, 468. I am indebted to Professor A. C. McLaughlin for calling my attention to this reference.

[2] *Cf. supra*, p. 20.

Gunning Bedford, of Delaware, speaking in the Convention on June 4 on the subject of the executive veto, expressed himself as

opposed to every check on the legislative, even the council of revision first proposed. He thought it would be sufficient to mark out in the Constitution the boundaries to the legislative authority, which would give all the requisite security to the rights of the other departments. The representatives of the people were the best judges of what was for their interest and ought to be under no external controul whatever. The two branches would produce a sufficient controul within the legislature itself.[1]

John F. Mercer, of Maryland. On August 15 Madison moved that all acts, before they became laws, should be submitted to both the executive and supreme judiciary departments and, upon being vetoed by either or both of these departments, be repassed only by extraordinary majorities. Mercer

heartily approved the motion. It is an axiom that the judiciary ought to be separate from the legislative; but equally so that it ought to be independent of that department. The true policy of the axiom is that legislative usurpation and oppression may be obviated. He disapproved of the doctrine that the judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made and then to be uncontroulable.[2]

[1] Farrand, vol. i, p. 100.

[2] *Ibid.* vol. ii, p. 298.

Mercer evidently feared "legislative oppression," and when the motion to have acts submitted to the judiciary before they should become laws was rejected, he may have changed his mind on the subject of judicial control. However that may be, he stands on record as distinctly disapproving the doctrine.

Richard Spaight, of North Carolina, was undoubtedly opposed to judicial control over legislation, although he does not appear to have said anything on the subject in the constitutional Convention. In the spring of 1787 the superior court of North Carolina, in the case of Bayard *v.* Singleton, declared an act of the legislature of that state null and void on the ground that it was not warranted by the Constitution of the Commonwealth. The decision aroused much popular opposition and Spaight joined in the protest against the action of the court. In a letter dated Philadelphia, August 12, 1787, and directed to Mr. Iredell, Spaight wrote:

> I do not pretend to vindicate the law which has been the subject of controversy; it is immaterial what law they have declared void; it is their usurpation of the authority to do it that I complain of, as I do most positively deny that they have any such power; nor can they find anything in the Constitution, either directly or impliedly, that will

support them, or give them any color of right to exercise that authority. Besides it would have been absurd, and contrary to the practice of all the world, had the Constitution vested such power in them as would have operated as an absolute negative on the proceedings of the legislature, which no judiciary ought ever to possess....

He further declared that "many instances might be brought to show the absurdity and impropriety of such power being lodged in the judges." He was aware, he explained, of the desirability of a check on the legislature, but he thought an annual election the best that could be devised.[1]

Pierce Butler, of South Carolina, and *John Langdon*, of New Hampshire, were members of the first Senate of the new Union, and both voted against the Judiciary Act of 1789.[2] Their reasons for so voting are not apparent; and it may be questioned whether a vote cast against the act as a whole is evidence of opposition to the principle of judicial control over federal legislation recognized in the twenty-fifth section of the act. If, however, these two names be added, the list of opponents of judicial control contains five members of the Convention, and but one of the five, Butler, belonged to the influential group.

[1] Coxe, *An Essay on Judicial Power*, pp. 248 *et seq.* and 385.
[2] *Annals of Congress*, vol. i, p. 51.

Mr. Boudin lays much stress on the silence of those who disliked judicial control of legislation. He says:

> It is absurd to assume that the many avowed opponents of judicial control of legislation who sat in the convention would have agreed to the [judiciary] article without a murmur had they suspected that it contained even a part of the enormous power which our judiciary now exercises. Richard Spaight for one, whose fiery denunciation of this power I have quoted above, would have made the halls in which the Convention met ring to the echo with his emphatic protest, had he suspected any such implications.[1]

The "avowed opponents" do not seem to have been "many"; but whether they and the unavowed opponents were many or few, they must have been fully aware that most of the leading members regarded the nullification of unconstitutional laws as a normal function. The view was more than once clearly voiced in the Convention, and any delegate who was not aware of such implications must have been very remiss in the discharge of his duties.

On June 4 King definitely stated that the judges in the exposition of the laws would no doubt stop the operation of such as appeared repugnant to the Constitution.[2] On that day there were present representatives from Massachusetts, Connecticut, New

[1] *Loc. cit.*, pp. 248, 249. [2] Farrand, vol. i, p. 109.

York, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. In addition to members in the group of twenty-five enumerated above there were recorded as present on that occasion Bedford, McClurg, Pierce and Yates.[1] Several other members, including Spaight, were in Philadelphia at the time and were probably in attendance at that particular session, but as there was no preliminary roll call the list of those actually present must be made up from those who addressed the Convention or appeared in the roll on a divided vote, or from an outside source.

The proposition to associate the federal judges with the executive in controlling acts of Congress was again brought up in the Convention by Mr. Wilson on July 21st and again defeated. The following extracts are from Madison's notes of the debates on this occasion.[2]

Mr. Wilson moved, as an amendment to the tenth Resolution, "that the Supreme National Judiciary should be associated with the Executive in the revisionary power." This proposition had been before made and failed; but he was so confirmed by reflection in the opinion of its utility that he thought it incumbent on him to make

[1] Farrand, vol. i, pp. 96 ff.

[2] *Madison Papers*, vol. ii, p. 1161 ff.; Farrand, vol. ii, pp. 22 ff.

another effort. The judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It had been said that the judges, as expositors of the laws, would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the judges in refusing to give them effect. Let them have a share in the revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions, the improper views of the Legislature.—Mr. Madison seconded the motion.

Mr. Gorham did not see the advantage of employing the judges in this way. As judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures. Nor can it be necessary as a security for their constitutional rights. The judges in England have no such additional provision for their defence, yet their jurisdiction is not invaded. He thought it would be best to let the executive alone be responsible, and at most to authorize him to call on judges for their opinions.

Mr. Ellsworth approved heartily of the motion. The aid of the judges will give more wisdom and firmness to the executive. They will possess a systematic and accurate knowledge of the laws, which the executive cannot be expected always to possess. The law of nations also will frequently come into question. Of this the judges alone will have competent information.

Mr. Madison considered the object of the motion as of

great importance to the meditated Constitution. It would be useful to the judiciary department by giving it an additional opportunity of defending itself against legislative encroachments. It would be useful to the executive, by inspiring additional confidence and firmness in exerting the revisionary power. It would be useful to the Legislature, by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity, and technical propriety in the laws, qualities peculiarly necessary, and yet shamefully wanting in our Republican codes. It would, moreover, be useful to the community at large, as an additional check against a pursuit of those unwise and unjust measures which constituted so great a portion of our calamities. If any solid objection could be urged against the motion, it must be on the supposition that it tended to give too much strength, either to the executive or judiciary. He did not think there was the least ground for this apprehension. It was much more to be apprehended, that, notwithstanding this coöperation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; and suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.

Mr Mason said he had always been a friend to this provision. It would give a confidence to the executive which he would not otherwise have, and without which the revisionary power would be of little avail.

Mr. Gerry did not expect to see this point, which had undergone full discussion, again revived. The object he

conceived of the revisionary power was merely to secure the executive department against legislative encroachment. The executive, therefore, who will best know and be ready to defend his rights, ought alone to have the defence of them. The motion was liable to strong objections. It was combining and mixing together the legislative and the other departments. It was establishing an improper coalition between the executive and judiciary departments. It was making statesmen of the judges, and setting them up as the guardians of the rights of the people. He relied, for his part, on the representatives of the people as the guardians of their rights and interests. It was making the expositors of the laws the legislators, which ought never to be done. A better experiment for correcting the laws would be to appoint, as had been done in Pennsylvania, a person or persons of proper skill, to draw bills for the Legislature.

Mr. Strong thought, with Mr. Gerry, that the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established. The judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws.

Mr. Gouverneur Morris. Some check being necessary on the Legislature, the question is, in what hands should it be lodged? On one side, it was contended that the executive alone ought to exercise it. He did not think that an executive appointed for six years, and impeachable while in office, would be a very effectual check. On the other side, it was urged, that he ought to be reinforced by the judiciary department. Against this it was objected that expositors of the laws ought to have no hand in making them, and arguments in favor of this had been drawn from England. What weight was due to them

might be easily determined by an attention to facts. The truth was that the judges in England had a great share in the legislation. They are consulted in difficult and doubtful cases. They may be, and some of them are, members of the Legislature. They are, or may be, members of the Privy Council; and can there advise the executive, as they will do with us if the motion succeeds. The influence the English judges may have, in the latter capacity, in strengthening the executive check, cannot be ascertained, as the King, by his influence, in a manner dictates the laws. There is one difference in the two cases, however, which disconcerts all reasoning from the British to our proposed Constitution. The British executive has so great an interest in his prerogatives, and such powerful means of defending them, that he will never yield any part of them. The interest of our executive is so inconsiderable and so transitory, and his means of defending it so feeble, that there is the justest ground to fear his want of firmness in resisting encroachments. He was extremely apprehensive that the auxiliary firmness and weight of the judiciary would not supply the deficiency. He concurred in thinking the public liberty in greater danger from legislative usurpations than from any other source. It had been said that the Legislature ought to be relied on, as the proper guardians of liberty. The answer was short and conclusive. Either bad laws will be pushed, or not. On the latter supposition, no check will be wanted. On the former, a strong check will be necessary. And this is the proper supposition. Emissions of paper money, largesses to the people, a remission of debts, and similar measures, will at some time be popular, and will be pushed for that reason. At other times, such measures will coincide with the interests of the Legislatures themselves, and that

will be a reason not less cogent for pushing them. It may be thought that the people will not be deluded and misled in the latter case. But experience teaches another lesson. The press is indeed a great means of diminishing the evil; yet it is found to be unable to prevent it altogether.

Mr. L. Martin considered the association of the judges with the executive as a dangerous innovation; as well as one that could not produce the particular advantage expected from it. A knowledge of mankind, and of legislative affairs, cannot be presumed to belong in a higher degree to the judges than to the Legislature. And as to the constitutionality of laws, that point will come before the judges in their official character. In this character they have a negative on the laws. Join them with the executive in the revision, and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature. Besides, in what mode and proportion are they to vote in the Council of Revision?

Mr. Madison could not discover in the proposed association of the judges with the executive, in the revisionary check on the Legislature, any violation of the maxim which requires the great departments of power to be kept separate and distinct. On the contrary, he thought it an auxiliary precaution, in favor of the maxim. If a constitutional discrimination of the departments on paper were a sufficient security to each other against encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a bal-

ance of powers and interests as will guarantee the provisions on paper. Instead, therefore, of contenting ourselves with laying down the theory in the Constitution that each department ought to be separate and distinct, it was proposed to add a defensive power to each, which should maintain the theory in practice. In so doing, we did not blend the departments together. We erected effectual barriers for keeping them separate. The most regular example of this theory was in the British Constitution. Yet it was not only the practice there to admit the judges to a seat in the Legislature, and in the Executive Councils, and submit to their previous examination all laws of a certain description, but it was a part of their Constitution that the executive might negative any law whatever; a part of their Constitution which had been universally regarded as calculated for the preservation of the whole. The objection against the union of the judiciary and executive branches, in the revision of the laws, had either no foundation, or was not carried far enough. If such a union was an improper mixture of powers, or such a judiciary check on the laws was inconsistent with the theory of a free constitution, it was equally so to admit the executive to any participation in the making of laws; and the revisionary plan ought to be discarded altogether.

Colonel Mason observed that the defence of the executive was not the sole object of the revisionary power. He expected even greater advantages from it. Notwithstanding the precautions taken in the constitution of the Legislature, it would still so much resemble that of the individual States that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It would have the effect, not only of hindering the final passage of such laws,

but would discourage demagogues from attempting to get them passed. It has been said (by Mr. L. Martin) that if the judges were joined in this check on the laws they would have a double negative, since in their expository capacity of judges they would have one negative. He would reply that in this capacity they could impede, in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive or pernicious, that did not come plainly under this description, they would be under the necessity, as judges, to give it a free course. He wished the further use to be made of the judges of giving aid in preventing every improper law. Their aid will be the more valuable, as they are in the habit and practice of considering laws in their true principles, and in all their consequences. . . .

In view of these discussions and the evidence adduced above, it cannot be assumed that the Convention was unaware that the judicial power might be held to embrace a very considerable control over legislation and that there was a high degree of probability (to say the least) that such control would be exercised in the ordinary course of events.

The accepted canons of historical criticism warrant the assumption that, when a legal proposition is before a law-making body and a considerable number of the supporters of that proposition definitely assert that it involves certain important and funda-

mental implications, and it is nevertheless approved by that body without any protests worthy of mention, these implications must be deemed part of that legal proposition when it becomes law; provided, of course, that they are consistent with the letter and spirit of the instrument. To go further than this—to say that the convention must have passed definitely upon every inference that could logically be drawn from the language of the instrument that it adopted—would of course be absurd.

In balancing conflicting presumptions in order to reach a judgment in the case, it must be remembered that no little part of the work of drafting the Constitution was done by the Committee of Detail and the Committee of Style.

The former committee, appointed on July 24, consisted of Rutledge, Wilson, Ellsworth, Randolph and Gorham. Of these five men two, Ellsworth and Wilson, had expressly declared themselves in favor of judicial control, and Wilson seems to have been the "dominating mind of the committee." This committee had before it the resolutions referred to it by the Convention on July 23. It had also before it the Pinckney plan, or an outline of it, and the New Jersey plan. The members of the committee had

been assiduous in their attendance upon the debates during the two months previous, and they prepared a draft of a constitution which they presented to the Convention on August 6. The article dealing with federal judicial power, as reported by the committee,[1] contained most of the provisions later embodied in the federal Constitution.

After lengthy debates on the draft submitted by the Committee of Detail, a committee of five was created to revise and arrange the style of the articles agreed to by the Convention; and Johnson, Hamilton, Gouverneur Morris, Madison, and King were selected as members of this committee. Of these five men four, Hamilton, Morris, Madison and King, are on record as expressly favoring judicial control over legislation. There is some little dispute as to the share of glory to be assigned to single members of the committee, but undoubtedly Gouverneur Morris played a considerable part in giving to the Constitution its final form. Speaking of his work on the Constitution, Mr. Morris later wrote:

> Having rejected redundant and equivocal terms, I believed it as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that

[1] Farrand, vol. ii, p. 186.

subject conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases which expressing my own notions would not alarm others nor shock their self-love.[1]

That the Constitution was not designed to be perfectly explicit on all points and to embody definitely the opinions of the majority of the Convention is further evidenced by a speech made by Abraham Baldwin, a member of the Convention from Georgia, in the House of Representatives on March 14, 1796. In speaking of the clause of the Constitution which provides that treaties are to be the supreme law of the land, he said:

He would begin it by the assertion, that those few words in the Constitution on this subject were not those apt, precise, definite expressions, which irresistibly brought upon them the meaning which he had been above considering. He said it was not to disparage the instrument, to say that it had not definitely, and with precision, absolutely settled everything on which it had spoken. He had sufficient evidence to satisfy his own mind that it was not supposed by the makers of it at the time but that some subjects were left a little ambiguous and uncertain. It was a great thing to get so many difficult subjects definitely settled at once. If they could all be agreed in, it would com-

[1] Sparks, *Life of Morris*, vol. iii, p. 323. Professor A. C. McLaughlin, in a letter to the author, suggests that the "conflicting opinions" referred to by Morris were not over the question of judicial review, but over the subjects of inferior federal courts and appeals from state tribunals.

pact the Government. The few that were left a little unsettled might, without any great risk, be settled by practice or by amendments in the progress of the Government. He believed this subject of the rival powers of legislation and treaty was one of them; the subject of the militia was another, and some question respecting the judiciary another. When he reflected on the immense difficulties and dangers of that trying occasion—the old Government prostrated, and a chance whether a new one could be agreed in—the recollection recalled to him nothing but the most joyful sensations that so many things had been so well settled, and that experience had shown there was very little difficulty or danger in settling the rest.[1]

[1] Farrand, vol. iii, p. 369.

CHAPTER III.

Judicial Control Before the Ratifying Conventions

It is urged by the opponents of judicial control that, whatever may have been the purpose of the members of the Philadelphia convention, the ratifying conventions in the states gave the final legal sanction to the Constitution, and a sound rule of interpretation would compel us to ascertain the opinion of these bodies on the point at issue. This contention cannot be gainsaid; but a full examination of the materials on the state conventions, as anyone can see, would require years of research into the lives and opinions of several hundred members. The author does not pretend to have made this research, and this essay is limited principally to a consideration of the purpose of the framers, not the enactors, of the Constitution. However, it is of interest to note what materials bearing on the purpose of the

enactors with regard to this point are contained in Elliot's *Debates*.

If the members of the Virginia convention which ratified the federal Constitution were in the dark as to this matter, or had any doubts as to the probable implications of the judiciary article, they must have been enlightened by the clear and unmistakable language of John Marshall. In replying to objections which had been raised regarding the danger of an extension of federal jurisdiction at the cost of the states, he pointed out that the proposed federal government was one of enumerated and limited powers.

> Has the government of the United States power to make laws on every subject?...Can they make laws affecting the mode of transferring property, or contracts, or claims between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.[1]

In the course of the discussion, Mr. Grayson said: "If the Congress cannot make a law against the Constitution I apprehend they cannot make a law to abridge it. The judges are to defend it."[2] Mr.

[1] Elliot's *Debates*, vol. iii, p. 553. [2] *Ibid.*, p. 567.

Pendleton declared: "The fair inference is that oppressive laws will not be warranted by the Constitution, nor attempted by our representatives, who are selected for their ability and integrity, and that honest, independent judges will never admit an oppressive construction."[1]

The Maryland convention was by no means uninformed regarding the possible functions of the judiciary under the proposed Constitution. In his famous letter directed to the legislature of the state, Luther Martin said:

> Whether, therefore, any laws or regulations of the Congress or any acts of its president or other officers are contrary to, or not warranted by, the Constitution, rests only with the judges who are appointed by Congress to determine; by whose determinations every state must be bound.[2]

If the members of the Pennsylvania ratifying convention had any doubts regarding the probable exercise of judicial control over legislation under the new Constitution, these must have been removed by one of Mr. Wilson's speeches in defence of the judiciary. Some members of the convention expressed the apprehension that, inasmuch as the federal courts were to have jurisdiction in all cases in law and equity

[1] Elliot's *Debates*, vol. iii, p. 548. [2] *Ibid.*, vol. i, p. 380.

arising under the Constitution and the laws of the United States, the power enjoyed by the judges might be indefinitely extended if Congress saw fit to make laws not warranted by the Constitution. On this point Mr. Wilson said:

> I think the contrary inference true. If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the Constitution predominates. Anything therefore that shall be enacted by Congress contrary thereto will not have the force of law.[1]

In New York, the members of the Convention must have known the clear and cogent argument for judicial control made by Hamilton in *The Federalist.*

If the members of the Connecticut convention were unaware of the fact that under the provisions of the Constitution the judiciary would enjoy the power to pass upon the constitutionality of federal and state statutes, it was their own fault; for, in his speech of January 7, 1788, on the power of Congress to lay taxes, Oliver Ellsworth carefully explained the new system. He said:

[1] McMaster and Stone, *Pennsylvania and the Federal Constitution,* p. 354.

This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.[1]

It would be entirely misleading to conclude, from this fragmentary evidence, that the question of judicial control over acts of Congress was adequately considered in the state conventions. It was judicial control over state statutes that aroused the most serious apprehensions of critics of the new frame of government. That they thought much—or cared much—about what might happen to acts of Congress is not apparent.[2] Still it cannot be said that they

[1] Elliot's *Debates*, vol. ii, p. 196. *Cf.* Farrand, vol. iii, p. 240.

[2] It is interesting to note that when, ten years later, the Kentucky and Virginia Resolutions raised the question of judicial control, and the other states had occasion to express a direct opinion on this point, none of them seems to have approved the doctrine expressed in the Resolutions. *Cf.* Ames, *State Documents on Federal Relations*, p. 16. The Massachusetts legislature replied to Virginia, on February 9, 1799: "This legislature are persuaded that the decision of all cases in law and equity arising under the Constitution of the United States and the construction of all laws made in pursuance thereof are exclusively vested by the people in the judicial courts of the United States." *Ibid.*, pp. 18 *et seq.* The Rhode Island assembly declared that "the words, to wit, 'The judicial power shall extend to all cases arising under the laws of the United States,' vest in the

were kept in the dark in this respect, or that they could not easily have learned, if the matter had interested them, what the framers of the Constitution intended and expected. And it may pertinently be asked what our constitutional position would be to-day, if it were recognized that each branch of the federal government, in addition to the clearly expressed powers conferred upon it, possesses those additional powers only which were understood, by the ratifying conventions of the states, to have been impliedly conferred!

federal courts exclusively, and in the Supreme Court of the United States ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States. "*Ibid.*, p. 17. The New Hampshire legislature resolved: "That the state legislatures are not the proper tribunals to determine the constitutionality of the laws of the general government; that the duty of such decision is properly and exclusively confided to the judicial department." Elliot's *Debates*, vol. iv, p. 539 (ed. 1861). The Vermont legislature asserted: "It belongs not to state legislatures to decide on the constitutionality of laws made by the general government, this power being exclusively vested in the judiciary courts of the Union." *Ibid.* The House of Representatives of Pennsylvania replied to Kentucky that the people of the United States "have committed to the supreme judiciary of the nation the high authority of ultimately and conclusively deciding upon the constitutionality of all legislative acts." Ames, *op. cit.*, p. 20. The Senate of New York replied to Virginia and Kentucky that the decision of all cases in law and equity was confided to the federal judiciary and that the states were excluded from interference. *Ibid.*, p. 23.

CHAPTER IV.

The Spirit of the Constitution.[1]

Those who hold that it was not the intention of the framers of the Constitution to establish judicial control of legislation make much of the opposition aroused by the sporadic attempts of a few state courts to exercise such a control prior to 1787. Dean Trickett cites the cases and exclaims: "These then are the precedents!" Mr. Boudin cites them and also exclaims: "Such were the state 'precedents', and such was the temper of the people at the time the Philadelphia convention met to frame the Constitution of the United States." The only trouble with this line of argument is that it leaves out of account the sharp political division existing in the United States in 1787 and the following years.

The men who framed the federal Constitution were not among the paper-money advocates and

[1] In this chapter I have reprinted a few pages from my *American Government and Politics.*

stay-law makers whose operations in state legislatures and attacks upon the courts were chiefly responsible, Madison informs us, for the calling of the convention. The framers of the Constitution were not among those who favored the assaults on vested rights which legislative majorities were making throughout the Union. On the contrary, they were, almost without exception, bitter opponents of such enterprises; and they regarded it as their chief duty, in drafting the new Constitution, to find a way of preventing the renewal of what they deemed "legislative tyranny." Examine the rolls of the state conventions that ratified the Constitution after it came from the Philadelphia convention, and compare them with the rolls of the legislatures that had been assailing the rights of property. It was largely because the framers of the Constitution knew the temper and class bias of the state legislatures that they arranged that the new Constitution should be ratified by conventions.

The makers of the federal Constitution represented the solid, conservative, commercial and financial interests of the country—not the interests which denounced and proscribed judges in Rhode Island, New Jersey and North Carolina, and stoned their

houses in New York. The conservative interests, made desperate by the imbecilities of the Confederation and harried by state legislatures, roused themselves from their lethargy, drew together in a mighty effort to establish a government that would be strong enough to pay the national debt, regulate interstate and foreign commerce, provide for national defence, prevent fluctuations in the currency created by paper emissions, and control the propensities of legislative majorities to attack private rights.

It is in the light of the political situation that existed in 1787 that we must inquire whether the principle of judicial control is out of harmony with the general purpose of the federal Constitution. It is an ancient and honorable rule of construction, laid down by Blackstone, that any instrument should be interpreted, "by considering the reason and spirit of it; or the cause which moved the legislator to enact it . . . From this method of interpreting laws, by the reason of them, arises what we call equity." It may be, therefore, that the issue of judicial control is a case in equity. The direct intention of the framers and enactors not being clearly expressed on this point, we may have recourse to the "reason and spirit" of the Constitution.

As Blackstone shows by happy illustration the reason and spirit of a law are to be understood only by an inquiry into the circumstances of its enactment. The underlying purposes of the Constitution, therefore, are to be revealed only by a study of the conditions and events which led to its formation and adoption.

At the outset it must be remembered that there were two great parties at the time of the adoption of the Constitution—one laying emphasis on strength and efficiency in government and the other on its popular aspects. Quite naturally the men who led in stirring up the revolt against Great Britain and in keeping the fighting temper of the Revolutionists at the proper heat were the boldest and most radical thinkers—men like Samuel Adams, Thomas Paine, Patrick Henry, and Thomas Jefferson. They were not, generally speaking, men of large property interests or of much practical business experience. In a time of disorder, they could consistently lay more stress upon personal liberty than upon social control; and they pushed to the extreme limits those doctrines of individual rights which had been evolved in England during the struggles of the small landed proprietors and commercial classes against royal

prerogative, and which corresponded to the economic conditions prevailing in America at the close of the eighteenth century. They associated strong government with monarchy, and came to believe that the best political system was one which governed least. A majority of the radicals viewed all government, especially if highly centralized, as a species of evil, tolerable only because necessary and always to be kept down to an irreducible minimum by a jealous vigilance.

Jefferson put the doctrine in concrete form when he declared that he preferred newspapers without government to government without newspapers. The Declaration of Independence, the first state Constitutions, and the Articles of Confederation bore the impress of this philosophy. In their anxiety to defend the individual against all federal interference and to preserve to the states a large sphere of local autonomy, these Revolutionists had set up a system too weak to accomplish the accepted objects of government; namely, national defence, the protection of property, and the advancement of commerce. They were not unaware of the character of their handiwork, but they believed with Jefferson that "man was a rational animal endowed by nature

with rights and with an innate sense of justice and that he could be restrained from wrong and protected in right by moderate powers confided to persons of his own choice." Occasional riots and disorders, they held, were preferable to too much government.

The new American political system based on these doctrines had scarcely gone into effect before it began to incur opposition from many sources. The close of the Revolutionary struggle removed the prime cause for radical agitation and brought a new group of thinkers into prominence. When independence had been gained, the practical work to be done was the maintenance of social order, the payment of the public debt, the provision of a sound financial system, and the establishment of conditions favorable to the development of the economic resources of the new country. The men who were principally concerned in this work of peaceful enterprise were not the philosophers, but men of business and property and the holders of public securities. For the most part they had had no quarrel with the system of class rule and the strong centralization of government which existed in England. It was on the question of policy, not of governmental structure, that they had

broken with the British authorities. By no means all of them, in fact, had even resisted the policy of the mother country, for within the ranks of the conservatives were large numbers of Loyalists who had remained in America, and, as was to have been expected, cherished a bitter feeling against the Revolutionists, especially the radical section which had been boldest in denouncing the English system root and branch. In other words, after the heat and excitement of the War of Independence were over and the new government, state and national, was tested by the ordinary experiences of traders, financiers, and manufacturers, it was found inadequate, and these groups accordingly grew more and more determined to reconstruct the political system in such a fashion as to make it subserve their permanent interests.

Under the state constitutions and the Articles of Confederation established during the Revolution, every powerful economic class in the nation suffered either immediate losses or from impediments placed in the way of the development of their enterprises. The holders of the securities of the Confederate government did not receive the interest on their loans. Those who owned western lands or looked with long-

ing eyes upon the rich opportunities for speculation there chaffed at the weakness of the government and its delays in establishing order on the frontiers. Traders and commercial men found their plans for commerce on a national scale impeded by local interference with interstate commerce. The currency of the states and the nation was hopelessly muddled. Creditors everywhere were angry about the depreciated paper money which the agrarians had made and were attempting to force upon those from whom they had borrowed specie. In short, it was a war between business and populism. Under the Articles of Confederation populism had a free hand, for majorities in the state legislatures were omnipotent. Anyone who reads the economic history of the time will see why the solid conservative interests of the country were weary of talk about the "rights of the people" and bent upon establishing firm guarantees for the rights of property.

The Congress of the Confederation was not long in discovering the true character of the futile authority which the Articles had conferred upon it. The necessity for new sources of revenue became apparent even while the struggle for independence was yet undecided, and, in 1781, Congress carried a resolu-

tion to the effect that it should be authorized to lay a duty of five per cent on certain goods. This moderate proposition was defeated because Rhode Island rejected it on the grounds that "she regarded it the most precious jewel of sovereignty that no state shall be called upon to open its purse but by the authority of the state and by her own officers." Two years later Congress prepared another amendment to the Articles providing for certain import duties, the receipts from which, collected by state officers, were to be applied to the payment of the public debt; but three years after the introduction of the measure, four states, including New York, still held out against its ratification, and the project was allowed to drop. At last, in 1786, Congress in a resolution declared that the requisitions for the last eight years had been so irregular in their operation, so uncertain in their collection, and so evidently unproductive, that a reliance on them in the future would be no less dishonorable to the understandings of those who entertained it than it would be dangerous to the welfare and peace of the Union. Congress, thereupon, solemnly added that it had become its duty "to declare most explicitly that the crisis had arrived when the people of the United States,

by whose will and for whose benefit the federal government was instituted, must decide whether they will support their rank as a nation by maintaining the public faith at home and abroad, or whether for the want of a timely exertion in establishing a general revenue and thereby giving strength to the Confederacy, they will hazard not only the existence of the Union but those great and invaluable privileges for which they have so arduously and so honorably contended."

In fact, the Articles of Confederation had hardly gone into effect before the leading citizens also began to feel that the powers of Congress were wholly inadequate. In 1780, even before their adoption, Alexander Hamilton proposed a general convention to frame a new constitution, and from that time forward he labored with remarkable zeal and wisdom to extend and popularize the idea of a strong national government. Two years later, the assembly of the state of New York recommended a convention to revise the Articles and increase the power of Congress. In 1783, Washington, in a circular letter to the governors, urged that it was indispensable to the happiness of the individual states that there should be lodged somewhere a supreme power to

regulate and govern the general concerns of the confederation. Shortly afterward (1785), Governor Bowdoin, of Massachusetts, suggested to his state legislature the advisability of calling a national assembly to settle upon and define the powers of Congress; and the legislature resolved that the government under the Articles of Confederation was inadequate and should be reformed; but the resolution was never laid before Congress.

In January, 1786, Virginia invited all the other states to send delegates to a convention at Annapolis to consider the question of duties on imports and commerce in general. When this convention assembled in 1786, delegates from only five states were present, and they were disheartened at the limitations on their powers and the lack of interest the other states had shown in the project. With characteristic foresight, however, Alexander Hamilton seized the occasion to secure the adoption of a recommendation advising the states to choose representatives for another convention to meet in Philadelphia the following year "to consider the Articles of Confederation and to propose such changes therein as might render them adequate to the exigencies of the union." This recommendation was cautiously

worded, for Hamilton did not want to raise any unnecessary alarm. He doubtless believed that a complete revolution in the old system was desirable, but he knew that, in the existing state of popular temper, it was not expedient to announce his complete program. Accordingly no general reconstruction of the political system was suggested; the Articles of Confederation were merely to be "revised"; and the amendments were to be approved by the state legislatures as provided by that instrument.

The proposal of the Annapolis convention was transmitted to the state legislatures and laid before Congress. Congress thereupon resolved in February, 1787, that a convention should be held for the sole and express purpose of revising the Articles of Confederation and reporting to itself and the legislatures of the several states such alterations and provisions as would when agreed to by Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the union.

In pursuance of this call, delegates to the new convention were chosen by the legislatures of the states or by the governors in conformity to authority con-

ferred by the legislative assemblies.[1] The delegates were given instructions of a general nature by their respective states, none of which, apparently, contemplated any very far-reaching changes. In fact, almost all of them expressly limited their representatives to a mere revision of the Articles of Confederation. For example, Connecticut authorized her delegates to represent and confer for the purpose mentioned in the resolution of Congress and to discuss such measures "agreeably to the general principles of Republican government" as they should think proper to render the Union adequate. Delaware, however, went so far as to provide that none of the proposed alterations should extend to the fifth part of the Articles of Confederation guaranteeing that each state should be entitled to one vote.

It was a truly remarkable assembly of men that gathered in Philadelphia on May 14, 1787, to undertake the work of reconstructing the American system of government. It is not merely patriotic pride that compels one to assert that never in the history of

[1] Rhode Island alone was unrepresented. In all sixty-two delegates were appointed by the states; fifty-five of these attended sometime during the sessions; but only thirty-nine signed the finished document.

assemblies has there been a convention of men richer in political experience and in practical knowledge, or endowed with a profounder insight into the springs of human action and the intimate essence of government. It is indeed an astounding fact that at one time so many men skilled in statecraft could be found on the very frontiers of civilization among a population numbering about four million whites. It is no less a cause for admiration that their instrument of government should have survived the trials and crises of a century that saw the wreck of more than a score of paper constitutions.

All the members had had a practical training in politics. Washington, as commander-in-chief of the revolutionary forces, had learned well the lessons and problems of war, and mastered successfully the no less difficult problems of administration. The two Morrises had distinguished themselves in grappling with financial questions as trying and perplexing as any which statesmen had ever been compelled to face. Seven of the delegates had gained political wisdom as governors of their native states; and no less than twenty-eight had served in Congress either during the Revolution or under the Articles of Confederation. There were men trained in the law,

versed in finance, skilled in administration, and learned in the political philosophy of their own and all earlier times. Moreover, they were men destined to continue public service under the government which they had met to construct—Presidents, Vice-Presidents, heads of departments, justices of the Supreme Court were in that imposing body. They were equal to the great task of constructing a national system strong enough to defend the country on land and sea, pay every dollar of the lawful debt, and afford sufficient guarantees to the rights of private property. The radicals, however, like Patrick Henry, Jefferson, and Samuel Adams, were conspicuous by their absence from the convention.

As Woodrow Wilson has concisely put it, the framers of the Constitution represented "a strong and intelligent class possessed of unity and informed by a conscious solidarity of interests."[1] They were not convened to write a Declaration of Independence, but to frame a government which would meet the practical issues that had arisen under the Articles of Confederation. The objections they entertained to direct popular government, and they were undoubtedly many, were based upon their experience

[1] *Division and Reunion*, p. 12.

with popular assemblies during the immediately preceding years. With many of the plain lessons of history before them, they naturally feared that the rights and privileges of the minority would be insecure if the principle of majority rule was definitely adopted and provisions made for its exercise. Furthermore, it will be remembered that up to that time the right of all men, as men, to share in the government had never been recognized in practice. Everywhere in Europe the government was in the hands of a ruling monarch or at best a ruling class; everywhere the mass of the people had been regarded principally as an arms-bearing and tax-paying multitude, uneducated, and with little hope or capacity for advancement. Two years were to elapse after the meeting of the grave assembly at Philadelphia before the transformation of the Estates General into the National Convention in France opened the floodgates of revolutionary ideas on human rights before whose rising tide old landmarks of government are still being submerged. It is small wonder, therefore, that under the circumstances, many of the members of that august body held popular government in slight esteem and took the people into consideration only as far as it was imperative "to inspire them with

the necessary confidence," as Mr. Gerry frankly put it.[1]

Indeed, every page of the laconic record of the proceedings of the convention preserved to posterity by Mr. Madison shows conclusively that the members of that assembly were not seeking to realize any fine notions about democracy and equality, but were striving with all the resources of political wisdom at their command to set up a system of government that would be stable and efficient, safeguarded on one hand against the possibilities of despotism and on the other against the onslaught of majorities. In the mind of Mr. Gerry, the evils they had experienced flowed "from the excess of democracy," and he confessed that while he was still republican, he "had been taught by experience the danger of the levelling spirit."[2] Mr. Randolph in offering to the consideration of the convention his plan of government, observed "that the general object was to provide a cure for the evils under which the United States labored; that, in tracing these evils to their origin, every man had found it in the turbulence and follies of democracy; that some check therefore was to be sought for against this tendency of our govern-

[1] Elliot's *Debates*, vol. v, p. 160. [2] *Ibid.*, vol. v, p. 136.

ments; and that a good Senate seemed most likely to answer the purpose."[1] Mr. Hamilton, in advocating a life term for Senators, urged that "all communities divide themselves into the few and the many. The first are rich and well born and the other the mass of the people who seldom judge or determine right."

Gouverneur Morris wanted to check the "precipitancy, changeableness, and excess" of the representatives of the people by the ability and virtue of men "of great and established property—aristocracy; men who from pride will support consistency and permanency . . . Such an aristocratic body will keep down the turbulence of democracy." While these extreme doctrines were somewhat counterbalanced by the democratic principles of Mr. Wilson who urged that "the government ought to possess, not only first, the force, but second the mind or sense of the people at large," Madison doubtless summed up in a brief sentence the general opinion of the convention when he said that to secure private rights against majority factions, and at the same time to preserve the spirit and form of popular government, was the great object to which their inquiries had been directed.[2]

[1] Elliot's *Debates*, vol. v, p. 138. [2] *The Federalist*, No. 10.

They were anxious above everything else to safeguard the rights of private property against any levelling tendencies on the part of the propertyless masses. Gouverneur Morris, in speaking on the problem of apportioning representatives, correctly stated the sound historical fact when he declared: "Life and liberty were generally said to be of more value than property. An accurate view of the matter would, nevertheless, prove that property was the main object of society . . . If property, then, was the main object of government, certainly it ought to be one measure of the influence due to those who were to be affected by the government."[1] Mr. King also agreed that "property was the primary object of society;"[2] and Mr. Madison warned the convention that in framing a system which they wished to last for ages they must not lose sight of the changes which the ages would produce in the forms and distribution of property. In advocating a long term in order to give independence and firmness to the Senate, he described these impending changes: "An increase of population will of necessity increase the proportion of those who will labor under all the hardships of life and secretly sigh for a more equal distribution of

[1] Elliot's *Debates* vol. v, p. 279. [2] *Ibid.*, vol. v, p. 280.

its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this country, but symptoms of a levelling spirit, as we have understood have sufficiently appeared, in a certain quarter, to give notice of the future danger."[1] And again, in support of the argument for a property qualification on voters, Madison urged, "In future times, a great majority of the people will not only be without landed, but any other sort of property. These will either combine, under the influence of their common situation,—in which case the rights of property and the public liberty will not be secure in their hands,—or, what is more probable, they will become the tools of opulence and ambition; in which case there will be equal danger on another side."[2] Various projects for setting up class rule by the establishment of property qualifications for voters and officers were advanced in the convention, but they were defeated. On account of the diversity of opinion that prevailed, agreement was impossible, and it was thought best to trust this

[1] Elliot's *Debates*, vol. v, p. 243. [2] *Ibid.*, vol. v, p. 387.

matter to the discretion and wisdom of the states.

Nevertheless, by the system of checks and balances placed in the government, the convention safeguarded the interests of property against attacks by majorities. The House of Representatives, Mr. Hamilton pointed out, "was so formed as to render it particularly the guardian of the poorer orders of citizens,"[1] while the Senate was to preserve the rights of property and the interests of the minority against the demands of the majority.[2] In the tenth number of *The Federalist*, Mr. Madison argued in a philosophic vein in support of the proposition that it was necessary to base the political system on the actual conditions of "natural inequality." Uniformity of interests throughout the state, he contended, was impossible on account of the diversity in the faculties of men, from which the rights of property originated; the protection of these faculties was the first object of government; from the protection of different and unequal faculties of acquiring property the possession of different degrees and kinds of property immediately resulted; from the influence of these on the sentiments and views of the respec-

[1] Elliot's *Debates*, vol. v, p. 244. [2] *Ibid.*, vol. v, p. 203.

tive proprietors ensued a division of society into different interests and parties; the unequal distribution of wealth inevitably led to a clash of interests in which the majority was liable to carry out its policies at the expense of the minority; hence, he added in concluding this splendid piece of logic "the majority, having such coexistent passion or interest, must be rendered by their number and local situation unable to concert and carry into effect schemes of oppression"; and in his opinion it was the great merit of the newly framed Constitution that it secured the rights of the minority against "the superior force of an interested and overbearing majority."

This very system of checks and balances, which is undeniably the essential element of the Constitution, is built upon the doctrine that the popular branch of the government cannot be allowed full sway, and least of all in the enactment of laws touching the rights of property. The exclusion of the direct popular vote in the election of the President; the creation, again by indirect election, of a Senate which the framers hoped would represent the wealth and conservative interests of the country; and the establishment of an independent judiciary appointed

by the President with the concurrence of the Senate —all these devices bear witness to the fact that the underlying purpose of the Constitution was not the establishment of popular government by means of parliamentary majorities.

Page after page of *The Federalist* is directed to that portion of the electorate which was disgusted with the "mutability of the public councils." Writing on the presidential veto Hamilton says:

> The propensity of the legislative department to intrude upon the rights, and absorb the powers, of the other departments has already been suggested and repeated.... It may perhaps be said that the power of preventing bad laws included the power of preventing good ones; and may be used to the one purpose as well as the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making and to keep things in the same state in which they happen to be at any given period, as more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may be possibly done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.

When the framers of the Constitution had completed the remarkable instrument which was to

establish a national government capable of discharging effectively certain great functions and checking the propensities of popular legislatures to attack the rights of private property, a formidable task remained before them—the task of securing the adoption of the new frame of government by states torn with popular dissensions. They knew very well that the state legislatures which had been so negligent in paying their quotas under the Articles and which had been so jealous of their rights, would probably stick at ratifying such a national instrument of government. Accordingly they cast aside that clause in the Articles requiring amendments to be ratified by the legislatures of all the states; and advised that the new Constitution should be ratified by conventions in the several states composed of delegates chosen by the voters. They furthermore declared—and this is a fundamental matter—that when the conventions of nine states had ratified the Constitution the new government should go into effect so far as those states were concerned. The chief reason for resorting to ratifications by conventions is laid down by Hamilton in the twenty-second number of *The Federalist:* "It has not a little contributed to the infirmities of the existing federal

system that it never had a ratification by the people. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers; and has in some instances given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a state, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a party to a compact has a right to revoke that compact, the doctrine itself has respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the consent of the people. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority."

Of course, the convention did not resort to the revolutionary policy of transmitting the Constitution directly to the conventions of the several states. It merely laid the finished instrument before the Confederate Congress with the suggestion that it should

be submitted to "a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and each convention assenting thereto and ratifying the same should give notice thereof to the United States in Congress assembled." The convention went on to suggest that when nine states had ratified the Constitution, the Confederate Congress should extinguish itself by making provision for the elections necessary to put the new government into effect. "What they [the convention] actually did, stripped of all fiction and verbiage," says Professor Burgess, "was to assume constituent powers, ordain a Constitution of government and of liberty, and demand the *plébiscite* thereon, over the heads of all existing legally organized powers. Had Julius or Napoleon committed these acts, they would have been pronounced *coups d'état*. Looked at from the side of the people exercising the *plébiscite*, we term the movement revolution. The convention clothed its acts and assumptions in more moderate language than I have used, and professed to follow a more legal course than I have indicated. The exact form of procedure was as follows: They placed in the body of the proposed Constitution itself a

provision declaring that ratifications by conventions of the people in nine states (commonwealths) should be sufficient for the establishment of the Constitution between the states (commonwealths) so ratifying the same. They then sent the instrument entire to the Confederate Congress, with the direction, couched in terms of advice, that the Congress should pass it along, untouched, to the legislatures of the commonwealths, and that these should pass it along, also untouched, to conventions of the people in each commonwealth, and that when nine conventions should have approved, Congress should take steps to put the new government into operation and abdicate. Of course the mass of the people were not at all able to analyze the real character of this procedure. It is probable that many of the members of the convention itself did not fully comprehend just what they were doing. Not many of them had had sufficient education as publicists to be able to generalize the scientific import of their acts." [1]

After the new Constitution was published and transmitted to the states, there began a long and bitter fight over ratification. A veritable flood of pamphlet literature descended upon the country,

[1] Burgess, *Political Science and Constitutional Law*, vol. i, p. 105.

and a collection of these pamphlets by Hamilton, Madison, and Jay, brought together under the title of *The Federalist*—though clearly a piece of campaign literature—has remained a permanent part of the contemporary sources on the Constitution and has been regarded by many lawyers as a commentary second in value only to the decisions of the Supreme Court. Within a year the champions of the new government found themselves victorious, for on June 21, 1788, the ninth state, New Hampshire, ratified the Constitution, and accordingly the new government might go into effect as between the agreeing states. Within a few weeks, the nationalist party in Virginia and New York succeeded in winning these two states, and in spite of the fact that North Carolina and Rhode Island had not yet ratified the Constitution, Congress determined to put the instrument into effect in accordance with the recommendations of the convention. Elections for the new government were held; the date March 4, 1789, was fixed for the formal establishment of the new system; Congress secured a quorum on April 6; and on April 30 Washington was inaugurated at the Federal Hall in Wall Street, New York.

CHAPTER V.

The Supporters of the New Constitution.

The new Constitution was ratified by conventions of delegates chosen at the polls; but it should be remembered that, under the property qualifications then imposed upon the suffrage, a large proportion of the adult males were debarred from participating in the elections. Generally speaking, the propertyless, who were disgruntled with the handiwork of the Philadelphia conference, could do nothing but gnash their teeth.

Among those who led in the ratification of the new Constitution everywhere were men of substantial property interests who had suffered most from the enterprises of the state legislatures. The supporters of the new instrument in the states included in their ranks the leaders in every economic activity: merchants, traders, shippers, land dealers, lawyers, capitalists, financiers, and professional men. This fact

is conclusively demonstrated by Dr. Libby's study [1] of the ratification of the Constitution and it is illustrated by the following letters and papers written by keen observers during the period of the struggle over the adoption of the new system of government.

William Grayson to James Monroe.

New York, May 29, 1787.

The delegates [to the Philadelphia convention] from the Eastward are for a very strong government, and wish to prostrate all the state legislatures, and form a general system out of the whole; but I don't learn that the people are with them, on the contrary in Massachusetts they think that government too strong and are about rebelling again, for the purpose of making it more democratical: In Connecticut they have rejected the requisition for the present year decidedly, and no man there would be elected to the office of a constable if he was to declare that he meant to pay a copper towards the domestic debt:—Rhode Island has refused to send members—the cry there is for a good government after they have paid their debts in depreciated paper:—first demolish the Philistines, *i.e.* their creditors, and then for *propriety*.

New Hampshire has not paid a shilling, since peace, and does not ever mean to pay one to all eternity:—if it was attempted to tax the people for the domestic debt 500 Shays would arise in a fortnight.—In New York they pay well because they do it by plundering New Jersey and Connecticut.—Jersey will go great lengths from motives

[1] *Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution.* Wisconsin University Publications (1897).

of revenge and Interest: Pennsylvania will join provided you let the sessions of the Executive of America be fixed in Philadelphia and give her other advantages in trade to compensate for the loss of state power. I shall make no observations on the southern states, but I think they will be, perhaps from different motives, as little disposed to part with efficient power as any in the Union.[1]

D. Humphreys to George Washington.

New Haven, Sept. 28, 1787.

All the different classes in the liberal professions will be in favour of the proposed Constitution. The clergy, lawyers, physicians and merchants will have considerable influence on society. Nor will the officers of the late army be backward in expressing their approbation. Indeed the well affected have not been wanting in efforts to prepare the minds of the citizens for the favorable reception of whatever might be the result of your proceedings. I have had no inconsiderable agency in the superintendence of two presses, from which more newspapers are circulated, I imagine, than from any others in New England. Judicious and well-timed publications have great efficacy in ripening the judgment of men in this quarter of the continent.[2]

Conjectures about the New Constitution by Hamilton, Autumn, 1787.

The new Constitution has in favor of its success these circumstances—a very great weight of influence of the persons who framed it, particularly in the universal pop-

[1] *Documentary History of the Constitution*, vol. I, pp. 170–171.
[2] *Ibid.*, vol. I, p. 302.

ularity of General Washington—the good will of the commercial interest throughout the states which will give all its efforts to the establishment of a government capable of regulating, protecting and extending the commerce of the Union—The good will of most men of property in the several states who wish a government of the union able to protect them against domestic violence and the depradations which the democratic spirit is apt to make on property;—and who are besides anxious for the respectability of the nation—a strong belief in the people at large of the insufficiency of the present confederation to preserve the existence of the union and of the necessity of the union to their safety and prosperity; of course a strong desire of a change and a predisposition to receive well the propositions of the convention.

Against the success is to be put the influence of many *inconsiderable* men in possession of considerable offices under the state governments who will fear a diminution of their consequence, power and emolument by the establishment of the general government and who can hope for nothing there—the influence of some *considerable* men in office possessed of talents and popularity who partly from the same motives and partly from a desire of *playing a part* in a convulsion for their own aggrandisement will oppose the quiet adoption of the new government—(some considerable men out of office, from motives of ambition may be disposed to act the same part)—add to these causes the democratical jealousy of the people which may be alarmed at the appearance of institutions that may seem calculated to place the power of the community in few hands and to raise a few individuals to stations of great preëminence—and the influence of some foreign powers who from different motives will not wish to see

an energetic government established throughout the states.[1]

James Madison to Thomas Jefferson. Dec. 9, 1787.

It is worthy of remark that whilst in Virginia and some of the other states in the middle and southern districts of the Union, the men of intelligence, patriotism, property, and independent circumstances, are thus divided; all of this description, with a few exceptions, in the eastern states, and most of the middle states, are zealously attached to the proposed Constitution. In New England, the men of letters, the principal officers of Govt., the judges and lawyers, the clergy, and men of property, furnish only here and there an adversary. It is not less worthy of remark that in Virginia where the mass of the people have been so much accustomed to be guided by their rulers on all new and intricate questions, they should on the present which certainly surpasses the judgment of the greater part of them, not only go before, but contrary to, their most popular leaders. And the phenomenon is the more wonderful, as a popular ground is taken by all the adversaries to the new Constitution. Perhaps the solution in both these cases, would not be very difficult; but it would lead to observations too diffusive; and to you unnecessary. I will barely observe that the case in Virga. seems to prove that the body of sober and steady people, even of the lower order, are tired of the vicissitudes, injustice and follies which have so much characterised public measures, and are impatient for some change which promises stability and repose.[2]

[1] *Documentary History of the Constitution*, vol. i, pp. 288–289.
[2] *Ibid.*, vol. i, p. 398.

H. Knox to Gen Washington, New York, Jan. 14, 1788.

Colonel Wadsworth writes me that the present Governor and Lieutenant Governor, the late Governor, the judges of the Supreme Court and the Council were of the convention and all for the constitution excepting Jas. Wadsworth.

The Massachusetts convention were to meet on the 9th. The decision of Connecticut will influence in a degree their determination and I have no doubt that the Constitution will be adopted in Massachusetts.—But it is at this moment questionable whether it will be by a large majority.

There are three parties existing in that state at present, differing in their numbers and greatly differing in their wealth and talents.

The 1st is the commercial part, of the state to which are added, all the men of considerable property, the clergy, the lawyers—including all the judges of all the courts, and all the officers of the late army, and also the neighbourhood of all the great towns—its numbers may include $\frac{4}{7}$ths of the state. This party are for the most vigorous government, perhaps many of them would have been still more pleased with the new Constitution had it been more analogous to the British Constitution.

The 2d party, are the eastern part of the state lying beyond New Hampshire formerly the Province of Main—This party are chiefly looking towards the erection of a new state, and the majority of them will adopt or reject the new Constitution as it may facilitate or retard their designs, without regarding the merits of the great question—this party $\frac{2}{7}$ths.

The 3d party are the Insurgents, or their favorers, the great majority of whom are for an annihilation of debts, public and private, and therefore they will not approve the new Constitution—this party ⅔ths.

If the 1st and 2d party agree as will be most probable, and also some of the party stated as in the insurgent interest, the Constitution will be adopted by a great majority notwithstanding all the exertions to the contrary [1]

In letters written by Rufus King to Madison dated in January, 1788, he said:

Our convention [in Massachusetts] proceeds slowly; and apprehension that the liberties of the people are in danger, and a distrust of men of property or education have a more powerful effect upon the minds of our opponents than any specific objections against the Constitution. . . . The friends of the Constitution, who in addition to their own weight are respectable as they represent a very large proportion of the good sense and property of this state, have the task not only of answering, but also of stating and bringing forward the objections of their opponents. The opposition complains that the lawyers, judges, clergymen, merchants and men of education are all in favor of the Constitution—and that for that reason they appear to be able to make the worse appear the better cause. But say they, if we had men of this description on our side, we should alarm the people with the imperfections of the Constitution and be able to refute the defence set up in its favor. Notwithstanding the superiority of talent in favor of the Constitution, yet the same infatuation which

[1] *Documentary History of the Constitution*, vol. i, p. 442.

prevailed not many months since in several counties of this state, and which emboldened them to take arms against the government, seems to have an uncontrollable authority over a numerous part of the convention. These objections are not directed against any part of the Constitution, but their opposition seems to arise from an opinion that is immovable, that some injury is plotted against them—that the system is the production of the rich and ambitious, that they discover its operations and that the consequence will be the establishment of two orders in the Society, one comprehending the opulent and great, the other the poor and illiterate. The extraordinary Union in favor of the Constitution in this state of the wealthy and sensible part of it, is in confirmation of these opinions and every exertion hitherto made to eradicate it, has been in vain.[1]

Jabez Bowen to George Washington.

Providence, Dec. 15, 1789.

The towns of Newport, Providence, Bristol, etc., with the whole mercantile interest in the other towns in the state are federal, while the farmers in general are against it. Their opposition arises principally from their being much in debt, from the insinuations of wicked and designing men, that they will lose their liberty by adopting it; that the salaries of the national officers are so verry high that it will take the whole of the money collected by the impost to pay them, that the intrest and principal of the general debt must be raised by dry taxation on real estates, etc. We have exerted our utmost abilities to

[1] Rufus King. *Life and Letters*, vol. i, pp. 314, 316.

convince them of the errors that they have imbibed by hearing to the *old Tories* and *desperate debtors*, but all in vain, what further, sir, is to be done? if we knew what our duty was, we are willing to do it, tho' I have no idea that the Antis will or can be induced to come in without the arm of power is exerted and that they shall be taught that the principles that they hould and Disseminate among the citizens of the neighboring states as well as this is inconsistent, and not proper to be professed by any person or persons that live on the territories of the United States: their wish is to overturn the whole Federal Government rather than this state should submit to it. If we fail in getting a convention at the next meeting of the general assembly, will Congress *protect* us if we separate from the State Government and appoint us officers to collect the revenue; if this should be thought well of and should be put in practice but in part I have no doubt but it will bring the country part of the community to their senses soon—and that one town and another will be a dropping off so that the opposition will be done away. Be pleased, sir, to give me an answer to this proposition as soon as convenient.[1]

On reading these papers by representative and thoughtful men of the period, it is difficult to escape the conclusion that the Constitution was looked upon as a bulwark against populism of every form. Surely men of the type here quoted as in support of the new instrument of government must have rejoiced in the knowledge (spread abroad by *The Federalist*)

[1] *Documentary History of the Constitution*, vol. ii, p. 226.

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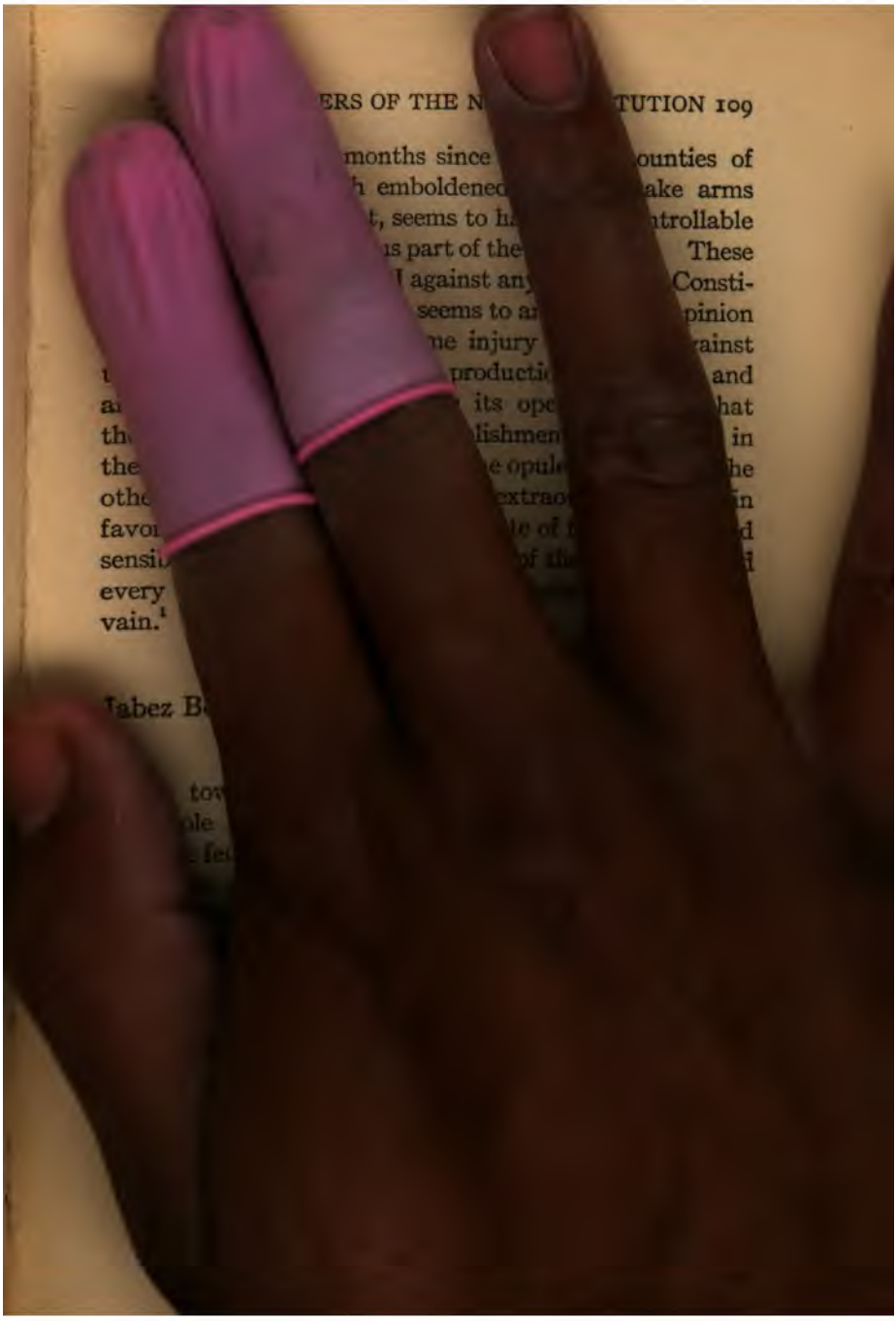

shall did, that it has the power to set aside an act of Congress violative of the Constitution, and that it will not hesitate in executing that power, no matter what the threatened consequences of popular or populistic wrath may be."

CHAPTER VI.

JOHN MARSHALL AND THE FATHERS

The great Justice who made the theory of judicial control operative had better opportunities than any student of history or law to-day to discover the intention of the framers of the federal Constitution. Marshall, to be sure, did not have before him Elliot's *Debates*, but he was of the generation that made the Constitution. He had been a soldier in the Revolutionary War. He had been a member of the Virginia convention that ratified the Constitution; and he must have remembered stating in that convention the doctrine of judicial control,[1] apparently without arousing any protest. He was on intimate, if not always friendly, relations with the great men of his

[1] *Cf. supra*, p. 69. In his argument in the case of Ware *v.* Hylton before the Supreme Court in 1796, Marshall said: "The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law unless such a jurisdiction is expressly given by the Constitution." 3 Dallas, 211. Here, however, Marshall was arguing as counsel, not stating his own personal views.

state who were instrumental in framing the Constitution. Washington once offered him the attorney-generalship. He was an envoy to France with two members of the convention, Charles Cotesworth Pinckney and Elbridge Gerry. He was a member of Congress for part of one term in Adams's administration; he was secretary of state under Adams; and he was everywhere regarded as a tower of strength to the Federalists.

As Marshall's colleague, Story, has truly said of him:

> He became enamored, not of a wild and visionary Republic, found only in the imaginations of mere enthusiasts as to human perfection, or tricked out in false colors by the selfish to flatter the prejudices or cheat the vanity of the people; but of that well-balanced Republic, adapted to human wants and human infirmities, in which power is to be held in check by countervailing power; and life, liberty and property are to be secured by a real and substantial independence, as well as division of the Legislative, Executive, and Judicial departments. . . . He was in the original, genuine sense of the word, a Federalist—a Federalist of the good old school, of which Washington was the acknowledged head, and in which he lived and died. In the maintenance of the principles of that school he was ready at all times to stand forth a determined advocate and supporter. On this subject he scorned all disguise; he affected no change of opinion; he sought no shelter from reproach.

It was, therefore, no closet philosopher, ignorant of the conditions under which the Constitution was established and unlearned in the reason and spirit of that instrument, who first enunciated from the supreme bench in unmistakable language the doctrine that judicial control over legislation was implied in the provisions of the federal Constitution.[1]

Those who hold that the framers of the Constitution did not intend to establish judicial control over federal legislation sometimes assert that Marshall made the doctrine out of whole cloth and had no precedents or authority to guide him. This is misleading. It is true that it was Marshall who first formally declared an act of Congress unconstitutional; but the fact should not be overlooked that in the case of Hylton *v.* the United States[2] the Supreme

[1] It has not escaped close observers, that the law which Marshall declared unconstitutional in Marbury *v.* Madison was a part of the Judiciary Act of 1789, which had been drafted and carried through by men who had served in the Convention. An analysis of the decision shows, however, that the section set aside was at most badly drawn and was not in direct conflict with the Constitution. Had Marshall been so inclined he might have construed the language of the act in such a manner as to have escaped the necessity of declaring it unconstitutional. *The Nation*, vol. lxxii, p. 104. The opportunity for asserting the doctrine, however, was too good to be lost, and Marshall was astute enough to take advantage of it. In view of the recent Jeffersonian triumph, he might very well have felt the need of having the great precedent firmly set.

[2] 3 Dallas, 171 (1796).

Court, with Ellsworth [1] as Chief Justice and Paterson as Associate Justice (both members of the convention), exercised the right to pass upon the constitutionality of an act of Congress imposing a duty on carriages. On behalf of the appellant in this case it was argued that the law was unconstitutional and void in so far as it imposed a direct tax without apportionment among the states. The Court sustained the statute. If it was not understood that the Court had the power to hold acts of Congress void on constitutional grounds, why was the case carried before it? If the Court believed that it did not have the power to declare the act void as well as the power to sustain it, why did it assume jurisdiction at all or take the trouble to consider and render an opinion on the constitutionality of the tax?

The doctrine of judicial control was a familiar one in legal circles throughout the period between the formation of the Constitution and the year 1803, when Marshall decided the Marbury case. In Hayburn's case, already cited, the federal judges had refused to execute a statute which they held to be unconstitutional. This was in 1792. In 1794, in

[1] Ellsworth did not take part in the decision, for he had just been sworn into office.

the case of Glass *v.* The Sloop Betsey,[1] the Supreme Court heard the doctrine of judicial control laid down by the counsel of the appellants:

> The well-being of the whole depends upon keeping each department within its limits. In the state governments several instances have occurred where a legislative act has been rendered inoperative by a judicial decision that it was unconstitutional; and even under the federal government the judges, for the same reason, have refused to execute an act of Congress.... To the judicial and not to the executive department, the citizen or subject naturally looks for determinations upon his property; and that agreeably to known rules and settled forms to which no other security is equal.

In the case of Calder *v.* Bull,[2] decided in 1798, the counsel for the plaintiffs in error argued "that any law of the federal government or of any of the state governments contrary to the Constitution of the United States is void; and that this court possesses the power to declare such law void." Justice Chase however refused to pass upon the general principle, because it was not necessary to the decision of the case before him. He said:

> Without giving an opinion at this time whether this court has jurisdiction to decide that any law made by Congress

[1] 3 Dallas, 13.
[2] 3 Dallas 386.

is void, I am fully satisfied that this court has no jurisdiction to determine that any law of any state legislature contrary to the constitution of such state is void.[1]

In the same case Justice Iredell said:

If any act of Congress or of the legislature of a state violates those constitutional provisions, it is unquestionably void; though I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case.

In view of the principles entertained by the leading members of the convention with whom Marshall was acquainted, in view of the doctrine so clearly laid down in number 78 of *The Federalist*, in view of the arguments made more than once by eminent counsel before the Supreme Court, in view of Hayburn's case and Hylton *v.* the United States, in view of the judicial opinions several times expressed, in view of the purpose and spirit of the federal Constitution, it is difficult to understand the temerity of those who speak of the power asserted by Marshall in Marbury *v.* Madison as "usurpation."

[1] Of course, as everybody knows, Chase adhered stoutly to the doctrine of federal judicial control.

CHAPTER VII.

MARBURY *v.* MADISON.[1]

In this celebrated case decided in 1803, Chief Justice Marshall definitely applied for the first time in the name of the Supreme Court the principle that the federal judiciary enjoyed the power of passing upon the constitutionality of the acts of Congress. The case grew out of an application by Marbury to the Supreme Court for a mandamus compelling the Secretary of State, Madison, to deliver to him a commission as justice of the peace in the District of Columbia—an office to which he had been appointed in the closing days of the Adams's administration. On his accession to power, Mr. Jefferson, specially embittered by the unseemly haste of the Federalists to engross as many officers as possible, refused to deliver to Marbury his commission. In the first part of his opinion, Chief Justice Marshall discussed the questions as to whether Marbury was duly entitled

[1] Cranch, 137.

to his commission, and whether mandamus was the remedy. On these two points he came to affirmative conclusions, but the application for mandamus was denied on the ground that the authority given to the Supreme Court, by the Judiciary Act, to issue a writ of mandamus in such a case was not warranted by the Constitution. The general principles on which Chief Justice Marshall rested his argument are laid down in the following extracts from his opinion in the case. By comparing them with the doctrines already enunciated by Hamilton, Paterson, and other leaders in the convention, one can see how closely Marshall caught the spirit of the Constitution.

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis

on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd

attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution

should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

In the face of the evidence above adduced, in the face of the political doctrines enunciated time and again on divers occasions by the leaders in the Convention, it certainly is incumbent upon those who say that judicial control was not within the purpose of the men who framed and enacted the federal Constitution to bring forward positive evidence, not arguments resting upon silence. It is incumbent upon them to show that the American federal system was not designed primarily to commit the established rights of property to the guardianship of a judiciary removed from direct contact with popular electorates. Whether this system is outworn, whether it has unduly exalted property rights, is a legitimate matter for debate; but those who hold the affirmative cannot rest their case on the intent of the eighteenth-century statesmen who framed the Constitution.

Note on the Views of Thomas Jefferson.

The great authority of Jefferson is often used by the opponents of judicial control; and it is true that, after his party was in command of the legislative and executive branches of the government, he frequently attacked judicial "usurpation" with great vehemence. The Federalists were in possession of the Supreme Court for some time after his inauguration. Jefferson was not a member of the convention that drafted the Constitution nor of the

Virginia convention that ratified it. There is, however, absolutely no question that at the time the Constitution was formed he favored some kind of direct judicial control. In a letter to Madison, dated Paris, December 20, 1787, he said: "I like the organization of the government into Legislative, Judiciary and Executive . . . And I like the negative given to the Executive with a third of either house, though I should have liked it better had the judiciary been associated for that purpose, or invested with a similar and separate power."[1] He had before him, of course, only a copy of the new instrument and the explanatory letters from his friends. In another letter from Paris, to F. Hopkinson, he approved the idea of a council of revision and added "What I disapproved from the first moment also was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government ["by" stricken out in the manuscript—it would be interesting to know whether he had in mind "the judiciary"], that is to say, to secure freedom in religion, freedom of the press, freedom from monopolies, *etc.*"[2] Jefferson favored a bill of rights because of "the legal check which it puts into the hands of the judiciary."[3]

[1] *Writings* (Ford ed.), vol. iv, pp. 475, 476.
[2] *Ibid.*, vol. v, p. 76. [3] *Ibid.*, vol. v, p. 81.

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